

1 IN THE SUPREME COURT FOR THE STATE OF ALASKA

2 RESOURCE DEVELOPMENT COUNCIL )  
3 FOR ALASKA, INC.; ALASKA TRUCKING )  
4 ASSOCIATION, INC.; ALASKA MINERS )  
5 ASSOCIATION, INC.; ASSOCIATED )  
6 GENERAL CONTRACTORS OF ALASKA; )  
7 ALASKA CHAMBER; and ALASKA )  
8 SUPPORT INDUSTRY ALLIANCE, )

9 Appellants, )

10 v. )

11 KEVIN MEYER, in his official capacity, )  
12 as Lt. Governor of the State of Alaska; )  
13 GAIL FENUMIAI, in her capacity as Director )  
14 of the Alaska Division of Elections; the )  
15 STATE OF ALASKA, DIVISION OF )  
16 ELECTIONS; and VOTE YES FOR )  
17 ALASKA'S FAIR SHARE, )

18 Appellees. )

Supreme Court No. S-\_\_\_\_\_

19 Trial Court Case No. 3AN-20-05901CI

20 **UNOPPOSED MOTION TO EXPEDITE APPEAL**

21 **I. INTRODUCTION**

22 Appellants Resource Development Council for Alaska, Inc.; Alaska Trucking  
23 Association, Inc.; Alaska Miners Association, Inc.; Associated General Contractors of  
24 Alaska; Alaska Chamber; and Alaska Support Industry Alliance ("Appellants") hereby  
25 move this Court to expedite this appeal and establish a briefing and argument schedule  
26 that would allow for a final decision by August 31, 2020. This appeal concerns the  
inclusion of the 19OGTX initiative on the ballot for the upcoming general election on  
November 3, 2020. Expedited consideration is necessary so that the Court may resolve

1 this matter before the Division of Elections sends the ballot to the printers on September  
2 2, 2020.<sup>1</sup> Counsel for Appellants have conferred with counsel for State Defendants and  
3 Defendant Vote Yes For Alaska's Fair Share, and State Defendants and Defendant Vote  
4 Yes For Alaska's Fair Share do not oppose the expedited briefing, argument, and  
5 decision deadlines proposed by Appellants in this motion.<sup>2</sup>

7 This case presents an important question of first impression about whether the  
8 legislature has any meaningful role in regulating the ballot initiative process, and  
9 whether courts should enforce laws as they are written and intended, or instead legislate  
10 from the bench as the trial court did here.

12 Trade associations representing most of Alaska's industry brought this lawsuit  
13 to challenge illegal signature-gathering efforts by proponents of the "Fair Share" ballot  
14 initiative. Fair Share hired a Las Vegas company to conduct signature gathering for its  
15 ballot petition, and that company violated Alaska's cap on payment to signature  
16 gatherers found in AS 15.45.110(c). Several Fair Share signature gatherers then filed  
17 false affidavits, certifying they had complied with the payment cap when in fact they  
18 had not. The legislature established that such conduct is criminal, AS 15.45.110(e) and  
19 that the Lt. Governor should not count ballot petition signatures that are not properly  
20 certified. AS 15.45.130. Instead of enforcing the law, the trial court issued a sweeping  
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26 <sup>1</sup> Aff. of Counsel Lee Baxter, ¶ 7 (July 20, 2020).

<sup>2</sup> *Id.*, ¶ 6.

1 order striking these laws as unconstitutional. The trial court’s dismissal order is  
2 procedurally and substantively flawed, and should be reversed by this Court.

3  
4 This case is about whether it is unconstitutional for the Alaska Legislature to  
5 limit the payment of circulators to ensure a ballot movement has grassroots support in  
6 Alaska and has not merely purchased its place on the ballot by paying professional  
7 circulators to gather the requisite number of signatures. Further, this case is about  
8 whether an initiative may be certified for the general-election ballot, even though the  
9 ballot group filed false certifications and the legislature expressly dictates that “the  
10 lieutenant governor may not count subscriptions on petitions not properly certified ...”<sup>3</sup>  
11 Appellants ask this Court to reverse the superior court’s order striking down AS  
12 15.45.110(c) and its ruling that a circulator’s false statement of compliance with the  
13 payment restrictions has no bearing on whether the Lt. Governor should count that  
14 petition.  
15  
16

17 Below and in response to a motion to dismiss and without consideration of any  
18 factual record, the superior court ruled unconstitutional two Alaska Statutes—AS  
19 15.45.110(c) and AS 15.45.130.<sup>4</sup> The Superior Court’s Order not only invalidates these  
20 current statutes, but strips the Alaska Legislature of its ability to regulate the payment  
21 of circulators working on signature-gathering activities of proponents of ballot  
22  
23

24  
25 <sup>3</sup> AS 15.45.130.

26 <sup>4</sup> See Order Regarding Motions to Dismiss and Motions for Summary Judgment  
at 8-12, 25-29 (July 16, 2020) (hereinafter “Superior Court’s Order”), attached as  
**Exhibit A.**

1 initiatives and to condition ballot access on circulator compliance with the rules  
2 governing signature gathering. The Superior Court’s Order reasons that any law that  
3 restricts a ballot group’s ability to pay petition circulators must meet the strict scrutiny  
4 test. The strict scrutiny test has been famously described by prominent legal  
5 commentators as “strict in theory, fatal in fact.”<sup>5</sup> This Court’s review of the Superior  
6 Court’s Order is necessary to uphold AS 15.45.110(c) and AS 15.45.130 and to reaffirm  
7 that the Alaska Legislature retains its ability to regulate the signature-gathering process  
8 that is central to the initiative process.  
9  
10

11 Expedited review is necessary to ensure that this dispute is not mooted by the  
12 State’s inclusion of the challenged initiative—19OGTX—on the general election  
13 ballot. The deadline for the State to send the general election ballots to the printers for  
14 the November 3, 2020 general election is September 2, 2020.<sup>6</sup>  
15

16 To ensure that the constitutionality of AS 15.45.110(c) and AS 15.45.130 and  
17 viability of the 19OGTX initiative does not evade appellate review before the general  
18 election ballots are printed, Appellants respectfully request this Court grant the  
19 following expedited briefing schedule that will allow the Court to reach a decision by  
20 August 31, 2020:  
21

- 22 • Trial court transfers record by **Friday, July 24, 2020.**  
23

24  
25 <sup>5</sup> See Gerald Gunther, *The Supreme Court Term 1971 -- Forward: In Search of*  
26 *Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86  
Harv. L. Rev. 1, 8 (1972).

<sup>6</sup> Aff. of Counsel, ¶ 7.

- Appellants’ and Cross-Appellant’s briefs and excerpts due **Thursday, July 30, 2020.**
- Appellees’ and Cross-Appellees’ briefs and excerpts due **Monday, August 10, 2020.**
- Reply briefs due **Friday, August 14, 2020.**
- Oral argument week of **August 24, 2020.**

## II. DISCUSSION

The Alaska Supreme Court has a long history of expediting appeals that implicate an upcoming election. Last year, in *Meyer v. Alaskans for Better Elections*,<sup>7</sup> the Court agreed to expedite the State’s appeal of the superior court’s ruling that the 19AKBE ballot initiative should be on this year’s general election ballot.<sup>8</sup> On July 1, 2020, this Court agreed to expedite the State’s appeal of a superior court’s order that the summary of 19OGTX (the initiative at issue in this appeal) had to be revised so that the State could obtain appellate review *before* it sends the ballots to the printer by September 2, 2020.<sup>9</sup> These are just a couple of the many examples of this Court recognizing that meaningful appellate review in election cases means that expedited briefing, oral argument, and decision deadlines are often necessary.<sup>10</sup>

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<sup>7</sup> *Meyer v. Alaskans For Better Elections*, \_\_\_\_ P.3d \_\_\_\_, \_\_\_\_, 2020 WL 3117316, \*13 (Alaska 2020).

<sup>8</sup> *See Meyer v. Alaskans for Better Elections*, No. S-17629 (Alaska Supreme Court Order, Nov. 5, 2019).

<sup>9</sup> *See Meyer v. Vote Yes for Alaska’s Fair Share*, No. S-17818 (Alaska Supreme Court Order, July 1, 2020).

<sup>10</sup> *See also McAlpine v. University of Alaska*, 762 P.2d 81, 82 (Alaska 1988).

1 Appellants were diligent in bringing this lawsuit, prosecuting it to final  
2 judgment, and filing this appeal despite the challenges of filing and litigating a case  
3 during the novel coronavirus pandemic.  
4

5 On March 17, 2020, Defendant Lieutenant Governor Kevin Meyer issued his  
6 decision certifying 19OGTX for the November 3, 2020 general-election ballot.<sup>11</sup> AS  
7 15.45.240 provides that a person aggrieved by a lieutenant governor's certification  
8 decision "may bring an action in the superior court to have the determination reviewed  
9 within 30 days of the date on which notice of the determination was given." Appellants  
10 filed this lawsuit within that timeframe on April 10, 2020.<sup>12</sup> On April 17, Appellants  
11 moved the superior court to grant expedited consideration of their motion to deem the  
12 lawsuit "non-routine" and to expedite discovery and a decision.<sup>13</sup> On May 26, 2020,  
13 the superior court ruled that Appellants were permitted to seek discovery from  
14 Defendant Vote Yes For Alaska's Fair Share and its professional circulator contractor  
15 Advanced Micro Targeting, Inc. ("AMT").<sup>14</sup> Appellants issued discovery requests to  
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22 <sup>11</sup> See Letter from Lt. Governor Meyer to Robin Brena (March 17, 2020) (available  
23 online at: [https://www.elections.alaska.gov/petitions/19OGTX/19OGTX-  
LetterToSponsor.pdf](https://www.elections.alaska.gov/petitions/19OGTX/19OGTX-LetterToSponsor.pdf)).

24 <sup>12</sup> Plaintiffs' Complaint for Injunctive and Declaratory Relief (April 10, 2020),  
25 attached as **Exhibit B**.

26 <sup>13</sup> Plaintiffs' Motion to Characterize Case as Non-Routine and to Set Expedited  
Discovery and August 2020 Trial Date (April 17, 2020), attached as **Exhibit C**.

<sup>14</sup> Oder Re Discovery Plan (May 26, 2020), attached as **Exhibit D**.

1 Defendant Vote Yes and domesticated and served a subpoena on AMT in Las Vegas,  
2 Nevada.<sup>15</sup>

3  
4 At the same time that Appellants were pursuing discovery from Vote Yes and  
5 AMT, the parties were litigating dispositive motions. The State and Defendant Vote  
6 Yes filed motions to dismiss, and Appellants filed a cross-motion for summary  
7 judgment.<sup>16</sup> On July 7, the superior court held oral argument on these pending  
8 dispositive motions.<sup>17</sup>

9  
10 On July 16, the superior court issued its Order Regarding Motion to Dismiss and  
11 Motions For Summary Judgment (“Superior Court’s Order”). The Superior Court’s  
12 Order ruled that Appellants were correct that AS 15.45.110(c) prohibited circulators  
13 from receiving payment in excess of \$1 per-signature collected, regardless of how the  
14 ballot group structured circulator payment (*i.e.*, hourly, salary, or per-signature basis of  
15 compensation).<sup>18</sup> However, the superior court went on to rule that AS 15.45.110(c)  
16 violated the First Amendment by unduly restricting Defendant Vote Yes’s ability to  
17 pay and utilize signature gatherers to put 19OGTX on the ballot.<sup>19</sup> Therefore, the  
18 superior court ruled that AS 15.45.110(c)’s payment restriction was “invalid.”<sup>20</sup> The  
19  
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22 <sup>15</sup> Aff. of Counsel, ¶ 3.

23 <sup>16</sup> *Id.*

24 <sup>17</sup> *Id.*

25 <sup>18</sup> **Exhibit A** at 1-2, 8-12.

26 <sup>19</sup> *Id.* at 12-20.

<sup>20</sup> *Id.* at 3.

1 Court also held that AS 15.45.130 required the lieutenant governor to count  
2 subscriptions even if those subscriptions were supported by a false affidavit from a  
3 signature gatherer.<sup>21</sup> The trial court reasoned that if AS 15.45.130 authorized the  
4 lieutenant governor to invalidate subscriptions supported by a circulator affidavit that  
5 contained a false statement of compliance with the payment restriction, then .130 was  
6 also an unconstitutional infringement on the free speech rights of those Alaskans that  
7 signed the 19OGTX initiative.<sup>22</sup> Thus, in the scope of one order, based on a Rule 12  
8 motion to dismiss and without any factual record, the trial court declared two different  
9 statutes unconstitutional. The trial court also ignored a large body of law from around  
10 the United States upholding the role of legislatures in regulating the initiative process  
11 and in enforcing such statutory requirements as a means to protect the integrity of the  
12 initiative itself.<sup>23</sup>

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15  
16 On Friday, July 17, 2020, the superior court issued its Final Judgment.

17 On Monday, July 20, Appellants filed this appeal.

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19 This Court's expedited review is necessary to provide Appellants meaningful  
20 appellate review of the superior court's striking down of AS 15.45.110(c) and

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21  
22 <sup>21</sup> *Id.* at 20-25.

23 <sup>22</sup> *Id.* at 25-29.

24 <sup>23</sup> See e.g. *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 777-78  
25 (Mont. 2006); *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 80  
26 (Me. 2002); *Brousseau v. Fitzgerald*, 675 P.2d 713, 715 (Ariz. 1984); *State ex rel.*  
*Schmelzer v. Board of Elections of Cuyahoga County*, 440 N.E.2d 801, 802-03 (Ohio  
1982); *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32, 47-48  
(Okla. 2006); *Benca v. Martin*, 500 S.W.3d 742, 748-49 (Ark. 2016).



1 AS 15.45.130. Alaska law provides that litigants have “one appeal as a matter of right  
2 from an action or proceeding commenced in either the district court or the superior  
3 court.”<sup>24</sup> Appellants seek to vindicate that right and for this Court to reverse the  
4 superior court’s order that leaves the 19OGTX initiative on the upcoming general-  
5 election ballot. In order to ensure that Appellants’ appeal as a matter of right is not  
6 mooted by the State’s printing of ballots, this Court should grant this motion and  
7 expedite this appeal.  
8

### 9 **III. CONCLUSION**

10  
11 This Court’s expedited review of the superior court’s order is necessary to  
12 determine these important issues regarding the constitutionality of Alaska’s initiative  
13 statutes, to reaffirm the Legislature’s ability to regulate circulator payment, and to  
14 invalidate the subscriptions supported by false circulator affidavits. For the foregoing  
15 reasons, Appellants respectfully request this Court grant the following expedited  
16 briefing schedule that will allow the Court to reach a decision by August 31, 2020:  
17

- 18 • Trial court transfers record by **Friday, July 24, 2020.**
- 19 • Appellants’ and Cross-Appellant’s briefs and excerpts due
- 20 **Thursday, July 30, 2020.**
- 21 • Appellees’ and Cross-Appellees’ briefs and excerpts due
- 22 **Monday, August 10, 2020.**
- 23 • Reply briefs due **Friday, August 14, 2020.**
- 24 • Oral argument week of **August 24, 2020.**

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26  

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<sup>24</sup> AS 22.05.010.

1 DATED at Anchorage, Alaska this 20th day of July, 2020

2 SCHWABE, WILLIAMSON & WYATT, P.C.  
3 Attorneys for Appellants

4  
5  
6 By: 

Matthew Singer  
Alaska Bar No. 9911072  
Lee C. Baxter  
Alaska Bar No. 1510085

7  
8  
9  
10 CERTIFICATE OF SERVICE

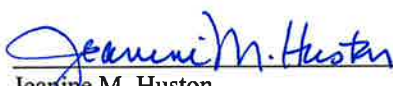
11 I hereby certify that on the 20<sup>th</sup> day of  
12 July, 2020, a true and correct copy of the  
foregoing was served upon the following by:

13 ☐ US Mail ☒ Email ☐ Fax ☐ Hand-Delivery

14 Margaret Paton-Walsh  
15 Statewide Section Chief  
Attorney General's Office  
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22   
23 Jeanine M. Huston

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11 KEVIN MEYER, in his official capacity, )  
12 as Lt. Governor of the State of Alaska; )  
13 GAIL FENUMIAI, in her capacity as Director )  
14 of the Alaska Division of Elections; the )  
15 STATE OF ALASKA, DIVISION OF )  
16 ELECTIONS; and VOTE YES FOR )  
17 ALASKA'S FAIR SHARE, )

18 Appellees. )

Supreme Court No. S-\_\_\_\_\_

19 Trial Court Case No. 3AN-20-05901CI

20 **AFFIDAVIT OF COUNSEL**  
21 **(In support of Motion to Expedited Appeal)**

22 STATE OF ALASKA )  
23 ) ss.  
24 THIRD JUDICIAL DISTRICT )

25 I, Lee C. Baxter, being first duly sworn, depose and state as follows:

26 1. My name is Lee Baxter. All statements in this affidavit are based on my  
own personal knowledge.

2. I am an attorney at Schwabe, Williamson & Wyatt, P.C. Matt Singer and  
I have been retained by Plaintiffs-Appellants in the above-captioned matter.

1           3.       On March 17, 2020, Lieutenant Governor Meyer certified the 19OGTX  
2 initiative for this year's general election ballot. *See* Letter from Lt. Governor K. Meyer  
3 to R. Brena (March 17, 2020) (available at: [https://www.elections.alaska.gov/petitions/](https://www.elections.alaska.gov/petitions/19OGTX/19OGTX-LetterToSponsor.pdf)  
4 [19OGTX/19OGTX-LetterToSponsor.pdf](https://www.elections.alaska.gov/petitions/19OGTX/19OGTX-LetterToSponsor.pdf)). Alaska Statute 15.45.240 provides that any  
5 person aggrieved by the lieutenant governor's certification decision "may bring an  
6 action in the superior court to have the determination reviewed within 30 days of the  
7 date on which notice of the determination was given." Plaintiffs-Appellants filed the  
8 instant lawsuit on April 10, 2020, and moved the superior court to treat the case as "non-  
9 routine," expedite discovery, and to issue a final decision. On May 26, 2020, the  
10 superior court granted Plaintiffs-Appellants' motion to expedited discovery. At the  
11 same time, the parties were litigating multiple dispositive motions, and on July 7, 2020,  
12 the superior court held oral argument on those motions.  
13

14           4.       On July 16, 2020, the superior court issued its order from which  
15 Plaintiffs-Appellants appeal. On Friday, July 17, 2020, the superior court issued its  
16 Final Judgment.  
17

18           5.       Plaintiffs-Appellants file this instant appeal on Monday, July 20, 2020.  
19

20           6.       Before filing this appeal, I conferred with counsel for State Defendants  
21 and counsel for Defendant Vote Yes For Alaska's Fair Share. Both counsel agreed to  
22 non-oppose the briefing schedule contained in Appellants' Motion For Expedited  
23 Appeal.  
24  
25  
26

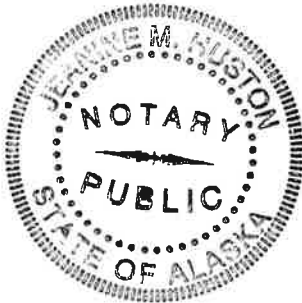
7. Before filing this appeal, my co-counsel Matt Singer conferred with counsel for State Defendants to determine the State's deadline to send ballots for the upcoming general election to the printers. Consistent with the State's representations in the *Meyer v. Vote Yes For Alaska's Fair Share*, S-17818 appeal, counsel for the State Defendant advised that the Division of Elections must send ballots to the printers by September 2, 2020.

FURTHER AFFIANT SAYETH NAUGHT.

LCe

Lee C. Baxter  
Alaska Bar No. 1510085

SUBSCRIBED AND SWORN TO before me this 20<sup>th</sup> day of July, 2020, at  
Anchorage, Alaska.



Janine M. Hester

Notary Public in and for the State of Alaska  
My Commission Expires: 1.31.2024

1 CERTIFICATE OF SERVICE

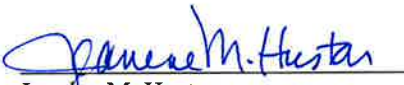
2 I hereby certify that on the 20<sup>th</sup> day of  
3 July, 2020, a true and correct copy of the  
foregoing was served upon the following by:

4 ☐ US Mail ☒ Email ☐ Fax ☐ Hand-Delivery

5 Margaret Paton-Walsh  
6 Statewide Section Chief  
Attorney General's Office  
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9 Robin O. Brena  
10 Jon S. Wakeland  
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13   
14 Jeanine M. Huston

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL )  
FOR ALASKA, INC.; ALASKA TRUCKING )  
ASSOCIATION, INC.; ALASKA MINERS )  
ASSOCIATION, INC.; ASSOCIATED )  
GENERAL CONTRACTORS OF ALASKA; )  
ALASKA CHAMBER; and ALASKA )  
SUPPORT INDUSTRY ALLIANCE, )

Plaintiffs, )

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KEVIN MEYER, in his official capacity as )  
Lt. Governor of the State of Alaska; )  
GAIL FENUMIAI, in her capacity as Director )  
Of the Alaska Division of Elections; the )  
STATE OF ALASKA, )  
DIVISION OF ELECTIONS; )  
and VOTE YES FOR ALASKA'S FAIR )  
SHARE, )

Defendants. )

Case No. 3AN-20-05901CI

**ORDER REGARDING MOTIONS TO DISMISS AND MOTIONS FOR  
SUMMARY JUDGMENT**

This case involves a dispute over payment to petition circulators. But more than that, it also involves a dispute over fundamental constitutional rights. The petition, if approved by the voters, would change the oil and gas production tax for certain oil fields on the North Slope. Plaintiffs, a group of companies opposed to the petition "For Alaska's Fair Share,"<sup>1</sup> seek an order declaring that petition circulators were paid money in excess of the statutory limit of \$1 per signature, and an injunction preventing the State from counting voters' signatures on the petition because of payments made to the circulators. The Vote Yes defendants offer an alternative interpretation of the payment statutes, but also challenge its constitutionality. The State Defendants, for their part, challenge the remedy sought

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<sup>1</sup> The Petition is formally known as 190GTX.

by Plaintiffs—disregard of all voters' signatures gathered by the paid circulators. The State argues that remedy is inconsistent with the State's responsibility under the applicable statute.

Ultimately, this case turns on the Court's interpretation of two provisions of the election statutes governing initiatives, AS 15.45.110(c), and AS 15.45.130. The Alaska Constitution enshrines the right of the people to propose and enact laws by initiative, and to approve or reject acts of the legislature by referendum.<sup>2</sup> Also implicated are fundamental First Amendment rights to engage in core political speech.

Plaintiffs Resource Development Council for Alaska, Alaska Chamber, Alaska Miners Association, Alaska Support Industry Alliance, Alaska Trucking Association, and Associated General Contractors of Alaska (collectively referred to as "RDC" or "Plaintiffs"), have brought this action seeking declaratory judgment and an injunction against the State and sponsors of the ballot measure at issue. The state Defendants include the lieutenant governor and Director of the Division of Elections in their official capacities, along with the State Division of Elections (collectively referred to as the "State"). Defendant Vote Yes for Alaska's Fair Share ("Fair Share" or "Vote Yes") is the official ballot group for the state-wide initiative seeking a change in the oil and gas production tax. All parties are represented by counsel. Before the Court are three motions: 1) the State Defendants' April 30, 2020 *Cross-Motion to Dismiss Pursuant to Alaska Civil Rule 12(b)(6)*;<sup>3</sup> 2) Defendant Fair Share's May 18, 2020, *Motion to Dismiss*; and 3) Plaintiffs' June 2, 2020 *Cross Motion for Partial Summary Judgment*. These three motions are interrelated as they ask to the Court to interpret two provisions of Alaska's election statutes relating to voter initiatives, AS 15.45.110(c) and AS 15.45.130.

For the reasons which follow, the Court grants the Defendants' two Motions to Dismiss, and denies the Plaintiff's Cross-Motion for Summary Judgment. The Court

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<sup>2</sup> Alaska Const. art. XI, § 1.



agrees with the Plaintiffs' statutory interpretation of the signature payment statute, AS 15.45.110(c), but the statute is constitutionally flawed and therefore invalid. In addition, the Court agrees with the State's statutory interpretation of the circulator certification statute, AS 15.45.130. Alternatively, Plaintiffs' proposed remedy and request for injunctive relief—disregard of 39,000 valid signatures on the petition—is constitutionally flawed and would result in the disenfranchisement of thousands of Alaska voters who did nothing wrong.

## I. ALASKA'S INITIATIVE PROCESS

Alaska allows its citizens to place propositions on the ballot through an initiative process.<sup>4</sup> The initiative allows people the ability to introduce legislation through popular vote by allowing the citizens, through the collection of voter signatures, to propose legislation and make it law.<sup>5</sup> Generally speaking, this process is known as direct democracy, which provides the opportunity for the people to draft legislation directly through "grass roots" efforts, as opposed to through the legislature. Petition circulation is "core political speech," because it involves political change made through interactive communication.<sup>6</sup> Although this kind of speech is protected by the First Amendment, there must also be regulation of elections to ensure they have qualities of fairness and honesty.<sup>7</sup> This policy is to ensure that there is some order, rather than chaos, to accompany the democratic process.<sup>8</sup>

The process begins when an initiative is proposed by an application containing the specific bill to be initiated.<sup>9</sup> The constitution restricts certain subjects

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<sup>3</sup> Defendants filed their motion in response to Plaintiff's Motion to Characterize Case as Non-Routine.

<sup>4</sup> Alaska Const. art. XI, § 1; see also AS 15.45.010–.245 (stating procedures regarding initiative law-making).

<sup>5</sup> See Ryan K. Manger, *Buckley v. American Constitutional Law Foundation: Can the State Preserve Direct Democracy for the Citizen, or Will It Be Consumed by the Special Interest Group?*, 19 St. Louis U. Pub. L. Rev. 177, 179 (2000) (describing the general process of direct democracy in the United States).

<sup>6</sup> *Buckley v. Am. Constitutional L. Found., Inc.*, 525 U.S. 182, 186 (1999).

<sup>7</sup> *Id.* at 187.

<sup>8</sup> *Id.*

<sup>9</sup> Alaska Const. art. XI, § 2.

from the initiative process.<sup>10</sup> In addition, if at any time before the election, substantially the same measure has been enacted, the petition becomes void.<sup>11</sup> The application must be signed by at least 100 qualified voters as sponsors and is then filed with the lieutenant governor.<sup>12</sup> If it is in the proper form,<sup>13</sup> then the lieutenant governor makes an initial certification.<sup>14</sup> After certification of the application, a petition is prepared for circulation by the sponsors.<sup>15</sup> By statute, petition circulators must meet certain residency requirements, and the amount they may be paid is limited to \$1 per signature.<sup>16</sup> The petition must be signed by a minimum number of qualified voters located throughout the state. The minimum number is equal to at least ten percent (10%) of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent (7%) of those who voted in the preceding general election in the house district.<sup>17</sup> Once the petition sponsors have obtained the required number of minimum signatures of qualified voters,<sup>18</sup> the petition may be filed with the lieutenant governor.<sup>19</sup> Before being filed, each petition must be certified by an affidavit of the person who personally circulated the petition.<sup>20</sup> Once filed, the lieutenant governor has sixty (60) days to review the petition and determine that it was properly filed.<sup>21</sup> This process involves a review of whether petition has been signed by the proper number of qualified voters in the required number of house districts throughout the

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<sup>10</sup> Alaska Const. art. XI, § 7.

<sup>11</sup> Alaska Const. art. XI, § 4.

<sup>12</sup> Alaska Const. art. XI, § 2; *see also* AS 15.45.020 (filing of application).

<sup>13</sup> *See* AS 15.45.030 (form of application).

<sup>14</sup> Alaska Const. art. XI, § 2; *see also* AS 15.45.070 (review of application); 6 AAC 25.240.

<sup>15</sup> AS 15.45.090 (preparation of petition).

<sup>16</sup> AS 15.45.105 (qualifications of circulator); AS 15.45.110 (circulation of petition).

<sup>17</sup> Alaska Const. art. XI, § 3.

<sup>18</sup> The petition sponsors have one year to obtain the required signatures.

<sup>19</sup> Alaska Const. art. XI, § 3.

<sup>20</sup> AS 15.45.130 (certification of circulator).

<sup>21</sup> AS 15.45.150 (review of petition).

state.<sup>22</sup> If the lieutenant governor determines the petition has been properly filed and meets criteria, then it is placed on the ballot for the voters to decide.<sup>23</sup>

## II. FACTS AND PROCEEDINGS

The Complaint indicates that in October, 2019 the Alaska Division of Elections provided printed booklets to the sponsors of the 19OGTX initiative.<sup>24</sup> Advanced Micro Targeting, a national professional signature gathering company was involved to collect the required signatures to put 19OGTX on Alaska's state-wide ballot.<sup>25</sup> There were apparently 786 signed petition booklets containing signatures in support of placing 19OGTX on the ballot, and 544 of them were submitted by circulators hired by Advanced Micro Targeting.<sup>26</sup> Those circulators swore that they had not "entered into an agreement with a person or organization in violation of AS 15.45.110(c)."<sup>27</sup> That section does not permit a circulator to be paid more than \$1 per signature. Plaintiffs allege they determined by public filings that Advanced Micro Targeting was paid \$72,500 by Vote Yes for Alaska's Fair Share. They further allege that Advanced Micro Targeting offered to pay its circulators more than the maximum \$1 per signature by advertising it would pay signature gatherers between \$3,500 to \$4,000 per month, expecting around 100 signatures per day, six days per week.<sup>28</sup> On April 10, 2020, Plaintiffs filed a complaint requesting declaratory and injunctive relief, requesting the Lieutenant Governor to invalidate petition booklets not properly certified and all subscriptions contained within those booklets.<sup>29</sup>

The State Defendants brought a *Motion to Dismiss Pursuant to Alaska Rule 12(b)(6)*, arguing for the Court to hold that the signatures cannot be invalidated

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<sup>22</sup> AS 15.45.160.

<sup>23</sup> AS 15.45.180 and 15.4.190.

<sup>24</sup> Compl. at 4.

<sup>25</sup> Compl. at 4.

<sup>26</sup> Compl. at 5.

<sup>27</sup> Compl. at 5.

<sup>28</sup> Compl. at 5.

<sup>29</sup> Compl. at 8.

solely because “circulators were paid more than \$1 per signature.”<sup>30</sup> The State argues that the Alaska Supreme Court construes the initiative statutes liberally to protect the right of the people to propose and enact laws, and that this Court should construe statutes to avoid the “wholesale disenfranchisement of qualified electors.”<sup>31</sup> Significantly, the State also contends that the initiative statutes do not require anything more than a “facial review” of the circulator certifications by the Lieutenant Governor, a requirement that was already met in this case.

Plaintiffs oppose the State’s motion, arguing that Alaska law prohibits the Lieutenant Governor from counting petition signatures that are supported by false circulator affidavits. Plaintiffs also assert that Defendants’ position ignores the intent of the legislature, and that Plaintiffs’ position is supported by both Alaska law and law from other states. For these reasons, Plaintiffs contend the Complaint pleads a proper cause of action (for injunction and declaratory relief) and request a denial of the *Motion to Dismiss*.

Fair Share has joined in the State’s Motion and arguments, but also filed a separate *Motion to Dismiss* on May 18, 2020. Fair Share contends that Plaintiffs’ interpretation of AS 15.45.110(c)—restricting any form of payment if it exceeds \$1 per signature—would be an unconstitutional restriction on free speech. Arguing against the Plaintiffs’ statutory interpretation, Fair Share also alleges that the legislative history shows the statute should only apply to compensation made per signature, and that the remedy is not disenfranchisement of voters.

Plaintiffs oppose Fair Share’s *Motion to Dismiss*, and also filed their own *Cross Motion for Partial Summary Judgment*. Plaintiffs argue that the statute (AS 15.45.110(c)) is not unconstitutional, and that the legislative history actually supports the conclusion that the payment limitation applies to all types of compensation. In Plaintiffs’ view, no more than \$1 per signature may be paid regardless of the method of payment (or the amount of time it takes to collect the signatures). Plaintiffs also

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<sup>30</sup> State Def.’s Cross-Mot to Dismiss at 14 (Apr. 30, 2020).

urge the Court to hold that AS 15.45.130 strictly prohibits the Lieutenant Governor from counting subscriptions (signatures) supported by a false statement. Defendant Fair Share opposes Plaintiffs' *Cross Motion*.

### III. DISCUSSION

The parties in this case have raised issues regarding interpretation of two key provisions of the initiative statutes: AS 15.45.110(c) and AS 15.45.130. Then, the Court is faced with the question posed by the Vote Yes defendants: whether the prohibition on circulator payment greater than \$1 per signature under AS 15.45.110(c) is an unconstitutional restriction on political speech.

#### A. Statutory Construction

"The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."<sup>32</sup> This involves consideration of "three factors: the language of the statute, the legislative history, and the legislative purpose behind the statute."<sup>33</sup> The court is to adopt "the rule of law that is most persuasive in light of precedent, reason, and policy."<sup>34</sup>

The Alaska Supreme Court has "rejected a mechanical application of the plain meaning rule in favor of a sliding scale approach."<sup>35</sup> However, the language of the statute is the "primary guide." It is presumed "that every word in the statute was intentionally included, and must be given some effect."<sup>36</sup> "The language of the statute is 'construed in accordance with [its] common usage,' unless the word or

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<sup>31</sup> State Def.'s Cross-Mot to Dismiss at 10.

<sup>32</sup> *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 905 (Alaska 1987).

<sup>33</sup> *Western Star Trucks, Inc. v. Big Iron Equipment Service, Inc.*, 101 P.3d 1047, 1050 (Alaska 2004).

<sup>34</sup> *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1133 (Alaska 2009) (citing *Enders v. Parker*, 66 P.3d 11, 13–14 (Alaska 2003)).

<sup>35</sup> *Municipality of Anchorage v. Suzuki*, 41 P.3d 147, 150 (Alaska 2002).

<sup>36</sup> *Id.* at 151.

phrase in question has 'acquired a peculiar meaning, by virtue of statutory definition or judicial construction.'<sup>37</sup>

As noted above, in Alaska the voters' ability to bypass the legislature and enact laws by initiative is a right guaranteed by the state constitution.<sup>38</sup> The requirements of the constitutional and statutory provisions regarding the use of initiatives should be liberally construed so that the people are permitted to vote and express their will on proposed legislation. As such, all doubts as to technical deficiencies or failure to comply with the exact letter of procedure are resolved in favor of permitting the people to vote.<sup>39</sup>

With these principles in mind, the starting point for the Court's analysis is the language of the statutes, and the parties' competing interpretations.

**B. Does AS 15.45.110(c) Prohibit Any Type of Payment to Petition Circulators, if Those Payments Effectively Pay Circulators More Than \$1 Per Signature?**

As noted above, Alaska determines the meaning of statutory language beginning with the plain meaning of the statutory text.<sup>40</sup> The legislative history of a statute can sometimes suggest a different meaning, but "the plainer the language of the statute, the more convincing contrary legislative history must be."<sup>41</sup> "Even if legislative history is 'somewhat contrary' to the plain meaning of a statute, plain meaning still controls."<sup>42</sup>

AS 15.45.110 provides for circulation of petitions, certain prohibitions and penalties for violation. The statute provides in pertinent part:

(c) A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or organization may

<sup>37</sup> *Id.* at 150–51 (quoting *Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783 788 (Alaska 1996)).

<sup>38</sup> Alaska Const. art. XI, § 4.

<sup>39</sup> *Boucher v Engstrom*, 528 P.2d 456, 462 (Alaska 1974), *overruled on other grounds by McAlpine v Univ. of Alaska*, 762 P.2d 81 (Alaska 1988); *see also, Thomas v Bailey*, 595 P.2d 1, 3 (Alaska 1979).

<sup>40</sup> *Hendricks-Pearce v. State, Dep't of Corr.*, 323 P.3d 30, 35 (Alaska 2014).

<sup>41</sup> *Id.* (quoting *Ward v. State, Dep't of Pub. Safety*, 288 P.3d 94, 98 (Alaska 2012)).

<sup>42</sup> *Id.* (quoting *Estate of Kim ex rel. Alexander v. Cox*, 295 P.3d 380, 387 (Alaska 2013)).

not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition.

(d) A person or organization may not knowingly pay, offer to pay, or cause to be paid money or other valuable thing to a person to sign or refrain from signing a petition.

(e) A person or organization that violates (c) or (d) of this section is guilty of a class B misdemeanor.<sup>43</sup>

In this case, Plaintiffs argue the language of the statute is clear and unequivocal—\$1 per signature is the maximum amount that can be paid to collect signatures on a petition, no matter what. Defendant Fair Share argues in its *Motion to Dismiss* that AS 15.45.110(c) does not restrict all forms of compensation for petition circulators. Fair Share contends that Plaintiffs' interpretation is incorrect, and that if the Court interpreted the statute to restrict all types of compensation, it would be an unconstitutional restriction on free speech. The constitutional concerns are addressed below. But first, does the statute actually prohibit any *form* of payment if it ends up being greater than \$1 per signature, or does it only prohibit *signature-based* payment?

The plain meaning of the words suggest no ambiguity. Petition circulators may not *receive* payment that is greater than \$1 per signature. The wording of the statute does not suggest it is capable of supporting Fair Share's interpretation. There is no discussion about the "form of payment." Instead, the language restricts the "amount of payment." A simple reading the plain words shows that if a circulator received payment that ended up being greater than \$1 per signature, no matter how it was received, it seems the statute would prohibit it.

Defendant Fair Share argues that the legislative history shows that the statute was originally introduced to prohibit the *signature-based type of payment* and leave other forms of payment unrestricted. In support of this argument, Fair Share points to excerpts from the legislative history.

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<sup>43</sup> AS 15.45.110(c)–(e).

In the Senate Judiciary Committee meeting held on March 18, 1998, Senator Sharp was the proponent of Senate Bill 313, which in part concerned the \$1 limit portion of AS 15.45.110(c). Senator Sharp stated:

And [Senate Bill 313] also prohibits payment per signature by the sponsor. Payment would still be allowed by the hour or any other method. And the reason for that, Mr. Chairman, is that Leg Legal has said that, in the Lower 48 where they prohibited payments of any kind for obtaining signatures of an initiative, it was declared [sic] unconstitutional restraint of the process. But they do believe other states have at least prohibited payments by the signature, and that has stood up in court so far. So this proposed legislation would do that.<sup>44</sup>

And so it is true that, at the very least, the bill was introduced intending to restrict the very signature-based payments that are at issue here. But analysis of the legislative history does not stop there. Plaintiffs argue that although the bill was introduced with that intent, it was revised in the House and eventually enacted in a form that restricted payments of any type. The original language of Senate Bill 313 contained substantially different language than the current statute. The original Bill as introduced in the Senate proposed language containing a crucial statement: "*This subsection does not prohibit a sponsor from being paid an amount that is not based on the number of signatures collected.*"<sup>45</sup> But the finally enacted legislation omitted that language. When the Bill was debated in the House, Representative Davies voiced a concern over removing the original language, stating:

I don't understand what the state interest is in slowing down getting signatures. But let me just say one other thing about the—the amendment would limit the amount of money that you could pay, and the existing language [from the original Bill] only limits the way in which you make payment. It doesn't limit the amount. You could pay the guy 100 bucks an hour if you want. There's no limit to how much you're paying.<sup>46</sup>

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<sup>44</sup> Hearing on S.B. 313 before the S. Judiciary Comm., 1998 Leg., 20th Sess. 20–21 (Alaska Mar. 18, 1998) (Def. Fair Share's Ex. 1) (statement of Sharp).

<sup>45</sup> Senate Bill No. 313 (Feb. 2, 1998) (Pl.s' Ex. A) (emphasis added).

<sup>46</sup> Hearing on S.B. 313 before the H. Finance Comm., 1998 Leg., 20th Sess. 78–79 (Alaska Mar. 8, 1998) (statement of Rep. Davies).



And because of that difference—I think that the existing language is much less subject to the constitutional challenge than the amendment. The amendment gets closer to a—in fact, is a limit. It's a hard limit in terms of how much you can pay. And as that—and I agree that it's different than the exact court case, but I think it's closer to the court case than the language that's in the bill, and for that reason is more likely to be overturned than the bill—than the language in the bill.<sup>47</sup>

This passage from the debate in the House shows that the critical language from the original Bill was intentionally amended out of the bill and replaced. The legislation as passed is plainly a restriction on all forms of payment. The present statutory language, unlike the language of the original Senate Bill, contains a very specific restriction on payment. It is as noted by Representative Davies "a hard limit in terms of how much you can pay."<sup>48</sup>

As Plaintiffs point out, the Legislature had another opportunity to permit other forms of payment in 2009, when House Bill 36 was introduced. That bill sought to add language to AS 15.45.110(c) stating that the subsection does not prohibit a person or organization from employing a circulator and paying an hourly wage or salary.<sup>49</sup> But again, the passed legislation did not include such language.

Returning to the statute as enacted, Senator Sharp noted that people might often assume "persons obtaining signatures on ballot initiatives are volunteers who believe strongly in a cause," and therefore the goal of Senate Bill 313 was to bring the process back to a more grass roots effort.<sup>50</sup> Immediately, Senator Sharp was concerned with what kind of laws held constitutional muster in the Lower 48, and stated that as a reason for proposing the initial cap on payment by signature.<sup>51</sup> It seems that the legislature attempted to get as close as possible to prohibiting payment to petition circulators, mindful of *Meyer v. Grant*.<sup>52</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> House Bill No. 36 (Pl.s' Ex. C).

<sup>50</sup> *Hearing on S.B. 313 before the S. Judiciary Comm., supra* note 44.

<sup>51</sup> *Id.*

<sup>52</sup> *Meyer v. Grant*, 486 U.S. 414 (1988), is discussed below.

Fair Share's argument that the statute allows other forms of payment, and only limits "per signature payments" ignores the plain language of the statute. While it certainly is true that the original intent of the bill would support Fair Share's reading, that is not what the language plainly says. To infer that the statute allows other forms of payment, even if doing so might exceed \$1 per signature, requires reading into the statute additional language that is simply absent. It is apparent, based on the plain language of the statute—and buttressed by the fact that the legislature had the opportunity to exempt other forms of payment yet chose not to do so—that AS 15.45.110(c) prohibits any form of payment if it ends up exceeding \$1 per signature gathered.

This Court cannot construe the statute to mean that monthly, hourly or salary type payments are permitted when the amount paid exceeds \$1 per signature. And it seems that, based on the transcripts of the 1998 hearings, the legislature was well aware of the constitutionality issue, and yet enacted the legislation with a hard limit of \$1 per signature regardless.

**C. Does the \$1 Per Signature Payment Limit of AS 15.45.110(c) create an Unconstitutional Restriction on Political Speech?**

"The Alaska Constitution provides that all political power is inherent in Alaska's people and 'founded upon their will only.'"<sup>53</sup> The people have the constitutional right to legislate directly by initiative.<sup>54</sup> And the people have the constitutional right to vote in any state or local election.<sup>55</sup> "The voters' right to enact laws by the initiative process requires the Court to interpret legislative procedures in favor of the exercise of the initiative power."<sup>56</sup>

Petition circulation is core political speech because it involves interactive communication concerning political change, and First Amendment protection for

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<sup>53</sup> *Meyer v. Alaskans for Better Elections*, No. S-17629, 2020 WL 3117316, at \*1 (Alaska June 12, 2020).

<sup>54</sup> *Id.* at \*1.

<sup>55</sup> Alaska Const. art. V, § 1.

<sup>56</sup> *N. W. Cruiseship Ass'n of Alaska, Inc. v State, Office of Lieutenant Governor, Division of Elections*, 145 P.3d 573, 582 (Alaska 2006).

such interaction is therefore at its zenith.<sup>57</sup> In considering a constitutional challenge to an election law, a court must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interest put forward by the State as justifications for the burden imposed by its rule.<sup>58</sup> The United States Supreme Court has said repeatedly that curbs on core political speech are to be strictly construed.<sup>59</sup> Exacting scrutiny has been applied when the restrictions in question significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests alleged to justify those restrictions.<sup>60</sup> A state's interest in ensuring the integrity of the election process and preventing fraud is compelling, but it bears the burden of proving that a regulation is narrowly tailored.<sup>61</sup>

Here, Fair Share argues that if AS 15.45.110(c) is interpreted to prohibit any type of payment that exceeds \$1 per signature, such interpretation would not constitutionally stand. In support of this assertion, Fair Share relies heavily on the United States Supreme Court case *Meyer v. Grant*, which held that a Colorado statute prohibiting the use of paid petition circulators abridged the right to engage in political speech, and was therefore unconstitutional.<sup>62</sup> Freedom of Speech is guaranteed by the First Amendment to the United States Constitution, and is among "the fundamental personal rights and liberties which are secured to all persons."<sup>63</sup> The *Meyer* Court applied strict scrutiny because it determined that initiative petition

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<sup>57</sup> *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008) (quotations omitted) (citing *Meyer*, 486 U.S. at 422, 425).

<sup>58</sup> *Id.* at 1034.

<sup>59</sup> See *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 499 (1985); *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 294 (1981); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

<sup>60</sup> *Buckley*, 525 U.S. at 193–94. "When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review, and a State's important regulatory interests are typically enough to justify reasonable restrictions." *Id.* at 206 (J. Thomas, concurring).

<sup>61</sup> *Nader*, 531 F.3d at 1037.

<sup>62</sup> *Meyer*, 486 U.S. at 414.

<sup>63</sup> *Id.* (quoting *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940)).

circulation involves both the expression of a desire for political change and a discussion of the merits of the proposed change.<sup>64</sup>

The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment.<sup>65</sup>

In its holding, the *Meyer* Court reasoned that the Colorado statute had an effect of restricting political expression by limiting the number of voices who convey the message and the hours they can speak, and so it limited the size of the audience they can reach.<sup>66</sup> The statute also made it less likely that the proponent of an initiative could garner the number of signatures necessary to place the matter on the ballot, limiting their ability to make the matter the focus of statewide discussion.<sup>67</sup> In essence, the prohibition against paid circulators had an inevitable effect of reducing the total amount of speech on a public issue.<sup>68</sup>

The US Supreme Court was "not persuaded by Colorado's arguments that the prohibition is justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process."<sup>69</sup> This is apparently what Senator Sharp was concerned with when Senate Bill 313 was introduced in 1998.<sup>70</sup> But *Meyer*, and other cases which follow make clear that an outright ban on payment to circulators is unconstitutional. And so the critical question now is whether a hard limit on payment of \$1 per signature, as opposed to an outright ban on payment like in *Meyer*, is also unconstitutional. Plaintiffs here face a high burden because the speech at issue is fundamental to our electoral process and at the core of the First Amendment freedoms.

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<sup>64</sup> *Id.* at 422; see also *Buckley*, 525 U.S. at 206 (J. Thomas, concurring).

<sup>65</sup> *Meyer*, 486 U.S. at 421 (quoting *Roth v United States*, 354 U.S. 476, 484 (1957) (citations omitted)).

<sup>66</sup> *Id.* at 422.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

Since the *Meyer* decision, courts in other jurisdictions have faced similar issues. The Ninth Circuit in *Nader v. Brewer*, decided after *Meyer*, faced the question of whether a statute requiring circulators to be Arizona residents was constitutional.<sup>71</sup> In rejecting the residence requirement, the Ninth Circuit held that such a restriction was also unconstitutional, because the restriction was not narrowly tailored to further the state's interest in preventing fraud. While the Court recognized that prevention of fraud is a legitimate concern, the statutory restriction was not supported by any evidence that out-of-state circulators caused any more problems than other circulators.<sup>72</sup>

In *Prete v. Bradbury*, the Ninth Circuit upheld an Oregon ballot measure that prohibited payment to circulators based on the number of signatures obtained.<sup>73</sup> The measure specified that it did not prohibit payment not based on the number of signatures.<sup>74</sup> The Ninth Circuit found that Oregon had an important regulatory interest in preventing fraud and its appearances in its electoral process.<sup>75</sup> But *Prete* did not apply strict scrutiny, because the plaintiffs in that case only established that the ballot measure imposed "lesser burdens" upon the initiative process.<sup>76</sup> And, it is important to note that *Prete* declined to hold that the ballot measure was facially constitutional.<sup>77</sup> Significantly, the measure upheld in *Prete*, is virtually the same as the *original* language proposed in SB 313. In light of the Ninth Circuit's decision, it would seem that Representative Davies' concern for the constitutionality of the amendment (now AS 15.45.110(c)) was prescient.

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<sup>69</sup> *Id.* at 428.

<sup>70</sup> See *supra* Section III.B.

<sup>71</sup> *Nader*, 531 F.3d at 1037.

<sup>72</sup> *Id.* The state argued that the residency restriction was narrowly tailored to ensure that circulators were subject to the state's subpoena power, and so the state can locate them within the ten-day period allotted for petition challenges. *Id.* The court did not find that the state provided evidence to support the contention the professional petition circulators can be "nomadic," or that there was any history of fraud related to non-resident circulators. *Id.*

<sup>73</sup> The *Prete* court declined to hold the ballot measure facially constitutional, but held that it could not conclude the measure imposed a "severe burden" under the First Amendment. *Prete v. Bradbury*, 438 F.3d 949, 953 n.5 (9th Cir. 2006).

<sup>74</sup> *Id.* at 952.

<sup>75</sup> *Id.* at 969.

AS 15.45.110(c) is to be viewed with exacting scrutiny because the \$1 limit significantly inhibits communication about proposed political change.<sup>78</sup> As discussed above, AS 15.45.110(c) imposes a "hard limit" on the *amount* a circulator can be paid, no matter how he or she might be paid. In that way, it is unlike the Oregon ballot measure discussed in *Prete* because that measure permitted other forms of payment, and more similar to the outright ban on payment analyzed by the Supreme Court of the United States in *Meyer*. Similar to the outright ban of any payment discussed in *Meyer*, a hard limit of \$1 per signature would have the similar inevitable effect of reducing the total quantum of speech on a public issue. The \$1 limit may not be the same as the complete prohibition of payment that the *Meyer* Court faced, but \$1 per signature is only one small step higher.

The same fundamental policies that caused the Supreme Court to take pause similarly apply when a circulator can be paid pocket change as opposed to no pay whatsoever: the size of the audience proponents can reach is limited; it is less likely that proponents will garner the number of signatures necessary to place the matter on the ballot; and limits their ability to "make the matter the focus of statewide discussion."<sup>79</sup> In fact, given Alaska's geographic expanse, and the exacting restrictions imposed on by AS 15.45.140, the limited pay of \$1 per signature becomes almost meaningless.

An example illustrates the point. AS 15.45.140 requires that sponsors of an initiative petition obtain signatures from qualified voters across the state, both on the road system and off. 1) The petition must be signed by qualified voters equal in number to ten percent (10%) of those who voted in the previous general election; 2) They must reside in at least three-fourths of the house districts of the state; and 3) Within each of the house districts described above, there must be at least seven

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<sup>76</sup> *Id.* at 952.

<sup>77</sup> *Id.* at 953 n.5.

<sup>78</sup> See *Buckley*, 525 U.S. at 193–94.

<sup>79</sup> See *Meyer*, 486 U.S. at 422.

percent (7%) who voted in the preceding general election in the house district.<sup>80</sup> Alaska has forty (40) house districts ranging from the North Slope to Southeast, and from Anchorage to the Aleutians.<sup>81</sup> It is not enough for a circulator to stand on the sidewalk in front of a shopping mall in Anchorage and gather signatures. Under the statute, circulators are required to obtain signatures in the vast remote parts of the state as well. Presumably, this is to ensure that a petition for a statewide ballot has enough support on a statewide basis.

But the limitation imposed by the undifferentiated \$1 per signature payment present very different obstacles to political speech when Alaska's geographic differences are considered. A similar number of ballots may have been cast in the 2018 general election in house districts 20 and 32, but each district presents far different challenges for petition circulators. District 20 covers Downtown Anchorage while District 32 covers Kodiak, Cordova and Seldovia.<sup>82</sup> The required number of signatures for an initiative (7%) is roughly the same (413 vs 439), but the effort necessary to assure the minimum number of signatures from each district is far different.<sup>83</sup> Given the First Amendment's fundamental policy to assure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," Alaska's \$1 per signature limit surely infringes on that fundamental right.<sup>84</sup>

If strict scrutiny is to be applied to AS 15.45.110(c), then there must be a compelling state interest, and the statute must be narrowly tailored to fit that interest.<sup>85</sup> Even though an interest in ensuring the integrity of the election process

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<sup>80</sup> AS 15.45.140(a)(1), (2), and (3).

<sup>81</sup> State of Alaska, Div. of Election, *House and Senate District Designations* (Dec. 9, 2013), <https://www.elections.alaska.gov/doc/forms/H07.pdf> (House and Senate District designations based on "Proclamation of Redistricting" dated July 14, 2013).

<sup>82</sup> *Id.*

<sup>83</sup> State of Alaska, Div. of Elections, *Public Information Packet on Initiatives 25* (Jan. 4, 2019), <https://www.elections.alaska.gov/doc/forms/H34.pdf>.

<sup>84</sup> See *Meyer*, 486 US at 421.

<sup>85</sup> See *Nader*, 531 F.3d at 1037.

and preventing fraud is compelling, the statute must still be narrowly tailored.<sup>86</sup> Plaintiffs argue that several states prohibit per-signature payment of circulators, implying that it means these interests have been upheld as being narrowly tailored or constitutional in some way. And in fact, the Second Circuit upheld a statute against a First Amendment challenge in *Person v. New York State Board of Elections*:

We join the Eighth and Ninth Circuit in holding that a state law prohibiting the payment of electoral petition signature gatherers on a per-signature basis does not per se violate the First or Fourteenth Amendments. Like our sister circuits, we find the record presented to use provides insufficient support for a claim that the ban on per-signature payment is akin to the complete prohibition on paying petition circulators that was deemed unconstitutional in *Meyer*, or that the *alternative methods of payment it leaves available are insufficient*.<sup>87</sup>

But here, AS 15.45.110(c) does not leave alternative methods for payment available, and so there is a greater restriction on circulators more akin to the problems described by the *Meyer* court.

No evidence or argument has been presented demonstrating how the \$1 per signature limit is narrowly tailored to fit any of the State's interests.<sup>88</sup> Plaintiffs repeatedly argue the integrity of the initiative process is paramount. When looking at the legislative history, it appears that the goals were to address potential problems in the initiative process: signature bounty hunters paid by the sponsors of initiatives, and to bring the process back to a more grass roots effort.<sup>89</sup> If the goal is to avoid "bounty hunting," the restriction actually contravenes that purpose by motivating circulators to get as many signatures as possible so they can be paid more. Additionally, an organization could choose to impose rules on their circulators to get a certain number of signatures even if they were paid hourly or monthly.<sup>90</sup> It is

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<sup>86</sup> *Id.*

<sup>87</sup> 467 F.3d 141, 143 (2d Cir. 2006) (internal citations omitted) (emphasis added).

<sup>88</sup> Although the State is a party in this case, it has so far not taken a position on the constitutional issue, and has not argued the state has a legitimate interest in support of AS 15.45.110(c).

<sup>89</sup> *Hearing on S.B. 313 before the S. Judiciary Comm., supra* note 44.

<sup>90</sup> In fact, Representative Grussendorf made a similar observation in 1998. "We have a suggestion as to the hourly rate, but I am concerned if you pay an hourly rate, then the person who is sponsoring or



also not persuasive enough, just as it was not for the *Meyer* Court, to argue that the purpose is to have sufficient grass roots support—given the significant effect on political speech.<sup>91</sup>

As discussed above, signatures on a petition must come from residents in at least three-fourths of the house districts in the state, a requirement that already assists in obtaining grass roots support from citizens.<sup>92</sup> In fact, if a circulator traveled by plane to a village to collect signatures, it is doubtful that payment of \$1 per signature would be sufficient compensation—such circulator would truly be a volunteer regardless. Whether it was made to help garner grass roots support for initiatives, or to deter bounty hunting—the payment restriction under AS 15.45.110(c) is not narrowly tailored to accomplish those goals.

The hard limit on payment imposed under AS 15.45.110(c) poses a substantial burden on the free speech rights of petition sponsors. Because the limit is so low, circulators may be forced to effectively be volunteers.<sup>93</sup> And it seems, based on the legislative history, that the legislature truly intended to come as close to that result as possible without creating an outright unconstitutional law.<sup>94</sup>

But legislating a cap of \$1 per signature on petition circulators is not a large enough step away from the facts underlying *Meyer* to withstand constitutional scrutiny. Perhaps if the original language allowing other forms of payment had

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bankrolling a payroll as such (indiscernible) reductions and everything (indiscernible) workman's comp to other problems that come in there, or maybe even a (indiscernible) system that within an hour we expect you have X amount of petitions—or signatures. I don't know if we can get by — you know, around that way." *Hearing on S.B. 313 before the H. Finance Comm., supra* note 46 (statement of Rep. Davies).

<sup>91</sup> See *Meyer*, 486 U.S. 414, 425 (1988).

<sup>92</sup> See, e.g., AS 15.45.160(2) (requiring the lieutenant governor to determine in part whether the subscribers were residents in at least three-fourths of the house districts of the state).

<sup>93</sup> In fact, such a restricted payment would very likely lead to violation of Alaska's Wage & Hour laws, since there appears to be no exception to payment of minimum wages for petition circulators.

<sup>94</sup> See, e.g., *Hearing on S.B. 313 before the S. Judiciary Comm., supra* note 44 (Senator Sharp wanting to keep initiatives as "grass roots" efforts while minding that a complete ban on payment was found unconstitutional). It is also worth noting that no parties have argued that the residency requirement under AS 15.45.105 is unconstitutional, despite case law indicating it might be. See, e.g., *Nader*, 531 F.3d at 1037 (holding the state of Arizona failed to meet its burden of showing that a residency requirement was narrowly tailored to further the compelling interest in preventing fraud).

remained in the bill when it was passed,<sup>95</sup> the statute might have withstood scrutiny. But in its current form, it does not. In this Court's view, the prohibition on payment greater than \$1 per signature under AS 15.45.110(c) is an unconstitutional restriction on free speech protected by the First Amendment to the United States Constitution.

**D. Is Requiring the State to Invalidate Signatures Gathered by Circulators Paid an Amount Greater than \$1 Per Signature an Appropriate Remedy?**

Regardless of the arguments over the payment statute, the heart of Plaintiffs' claim is the request for injunctive relief to prevent counting of the voters' signatures. Plaintiffs rely upon the language of AS 15.45.130 which says the lieutenant governor "may not count subscriptions on petitions *not properly certified* at the time of filing or corrected before the subscriptions are counted."<sup>96</sup> They suggest the meaning is clear—the State may not count signatures where petition circulator makes a false statement in the certification. The State offers an alternative reading of the statute—that its role is to assure completeness, not to determine whether the circulators have made a truthful and accurate affidavit of circulation. Fair Share, for its part, argues the Plaintiffs' proposed remedy would result in a mass disenfranchisement of the voters—a result which would again violate the First Amendment. So in this context, what is the meaning of "properly certified?"

AS 15.45.130 requires petitions to be certified by an affidavit by the circulator of the petition. The statute specifies that such affidavit must state in substance eight different points, one of them being "that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c)"—the provision prohibiting payment greater than \$1 per signature. "[T]he lieutenant governor may not count subscriptions on petitions not properly certified."<sup>97</sup> Despite this language, the statute does not define what it means to be "properly certified."

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<sup>95</sup> See *supra* Section II.A.

<sup>96</sup> AS 15.45.130.

<sup>97</sup> AS 15.45.130.

AS 15.80.010 contains a list of definitions applicable to the election laws including initiatives, but does not include a definition of "properly certified."<sup>98</sup>

As they did with the payment statute (AS 15.45.110), Plaintiffs focus upon the plain language of section 130. But rather than the words "properly certified," Plaintiffs emphasize the penal language "may not count." The latter words emphasize the remedy sought by Plaintiffs but do not illuminate what it means to be "properly certified" in the first instance.

The State argues the petitions were in fact "properly certified" because they were complete when filed, and the Lieutenant Governor had no duty to investigate the truth of the statements contained within them. But is this interpretation of the statute consistent with its purpose? More importantly, does a "complete" but incorrect affidavit support the remedy requested?

Other provisions of the initiative statutes suggest the focus is on verification of signatures. For example, AS 15.45.160 provides the bases for determining when a petition is *improperly filed*. That statute discusses the qualifications of the subscribers, and focuses on the number of signatures gathered. It mentions nothing about the accuracy of the circulator's certification. Similarly, AS 15.45.150 provides a strict timeline (60 days) for the lieutenant governor to complete "review" of the petition. The State argues this short timeframe makes it entirely unrealistic to think the review process includes investigation of the circulators and the accuracy of their affidavits. Instead, the focus is on the voters who signed the petition and the need to verify each signature. This argument is not unreasonable. In the end, the statutory scheme provides no clear meaning as to when an affidavit is deficient or when a petition is not "properly certified."

Fair Share and the State both argue that the initiative statute should be construed liberally to protect the right of the people to propose and enact laws, and

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<sup>98</sup> At oral argument, counsel was also questioned about a definition, but no party identified a statutory or other definition.

that doubts as to technical deficiencies should be resolved in favor of that purpose. Defendants also argue that a liberal construction is proper to avoid the disenfranchisement of voters, because voters have no control and no way to know about the payment of signature gatherers.

Defendants cite to several cases for the proposition that Alaska case law supports their construction, and the idea that the Alaska Supreme Court has previously declined to invalidate the ballots of voters based on error and avoided voter disenfranchisement.<sup>99</sup> Defendants analogize to *Kirkpatrick*,<sup>100</sup> a case from the Supreme Court of Missouri. Although it is worth noting that *Kirkpatrick* was analyzed under a burden-shifting approach, where the proponents needed to show—and in fact did show—the validity of the signatures despite irregularities in circular affidavits.<sup>101</sup> Crucial to that court's analysis was the recognition that "[t]he only statutory purpose in having a notary sign the petition to begin with is to provide a double check on the validity of the signatures of the voters. If the validity of the voters' signatures can be otherwise verified, their signatures should not be invalidated by the notary's negligence or deliberate misconduct."<sup>102</sup>

The Alaska Supreme Court has stated "the purpose of certification is to require circulators to swear to the truthfulness of their affidavits."<sup>103</sup> AS 15.45.130 requires a circulator to certify eight different points before the lieutenant governor is permitted to count subscriptions (signatures) on the filed petition and determine it to be sufficient. Of course, avoiding fraud and promoting the integrity of the process are important. So to enforce the requirements, the legislature has provided for specific, criminal penalties. A circulator making a false certification is subject to perjury charges and the class B misdemeanor provision under AS 15.45.110(c).

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<sup>99</sup> See, e.g., *Miller v. Treadwell*, 245 P.3d 867, 869 (Alaska 2010); *Willis v. Thomas*, 600 P.2d 1079, 1083 (Alaska 1979); *Fischer v. Stout*, 741 P.2d 217, 225 (Alaska 1987).

<sup>100</sup> *United Labor Comm. of Missouri v. Kirkpatrick*, 572 S.W.2d 449 (Mo. 1978).

<sup>101</sup> *Id.* at 453.

<sup>102</sup> *Id.* at 454.

<sup>103</sup> *N. W. Cruiseship Ass'n of Alaska*, 145 P.3d at 577.

In addition to the criminal penalties for the circulator, there are criminal penalties to a person or organization that offers or pays an improper payment to the petition circulator.<sup>104</sup> Further, even the voter signing the petition is subject to criminal penalties for signing the petition, knowing he or she is not a qualified voter.<sup>105</sup> Such voter commits the crime of Improper Subscription to Petition.<sup>106</sup> In addition to those involved in the initiative process, other participants in various phases of the electoral process are subject to criminal penalties for campaign misconduct and various forms of official misconduct.<sup>107</sup>

When the Alaska voter and initiative statutes are read as a whole, it appears the overriding policy concern is to assure that only properly qualified voters sign petitions, cast ballots, and otherwise participate in the electoral process. The statutes should not be read as a trap for the unwary.

The Plaintiffs cite to certain out-of-state cases, arguing they are persuasive because they focus on preserving the integrity of the process and the purpose of providing truthful affidavits. The Supreme Court of Arizona, for example, did a survey of law in other states relating to this issue in *Brousseau v. Fitzgerald*.<sup>108</sup> That court concluded "the authorities agree that statutory circulation procedures are designed to reduce the number of erroneous signatures, guard against misrepresentations, and confirm that signatures were obtained according to law."<sup>109</sup> It went on to state:

The only way to protect the process from fraud and falsehood is to make such conduct unprofitable. We hold that petitions containing false certifications by circulators are void, and the signatures on such petitions may not be considered in determining the sufficiency of the number of signatures to qualify for placement on the ballot.<sup>110</sup>

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<sup>104</sup> AS 15.45.110(c) and (d).

<sup>105</sup> AS 15.56.090.

<sup>106</sup> AS 15.56.090.

<sup>107</sup> See AS 15.56.012--199.

<sup>108</sup> *Brousseau v. Fitzgerald*, 456, 675 P.2d 713, 716 (1984).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

The Ohio Supreme Court's analysis in *Schmelzer* also drew an important distinction between a technical defect and a substantial failure to meet a statutory requirement.<sup>111</sup> The *Schmelzer* court noted that "mere technical irregularities" would not be enough to disturb the election process.<sup>112</sup> And the Ohio court, in a different case, invalidated an entire petition on the basis of fraud when a circulator's affidavit knowingly verified false signatures.<sup>113</sup>

But this case does not involve false signatures. In fact, there is no allegation by Plaintiffs that the signatures were false or defective in any way—only that the circulators were paid too much. Why should it make a difference whether the circulator was paid \$1 or \$2 for a signature? Does it somehow increase the likelihood that false signatures will be submitted? How is the integrity of the process improved by restricting payment to the circulator to an amount which is plainly unenticing? On the other side of the clipboard, is an Alaska voter more likely to listen to the pitchman simply because of a miniscule payment? Is the voter more likely to be persuaded to sign the petition? And for the innocent but persuaded voter, should the signature be invalidated because of an error by the circulator?

Alaskan voters should not be disenfranchised on the basis of "technical errors."<sup>114</sup> The *North West Cruiseship* case supports this Court's holding, because that Court upheld the narrowly tailored action by the Division. The Division's disqualification of a few pages that lacked the "paid by" information required by statute supported the integrity of the process while not brushing aside the rights of all the other innocent voters.<sup>115</sup> But in so holding, the Court reiterated its directive that Courts should seek constructions which avoid the whole disenfranchisement of qualified electors. The Supreme Court upheld the lieutenant governor's actions because they struck the proper balance between "the people's right to legislate by

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<sup>111</sup> See *State ex rel. Schmelzer v. Board of Elections*, 2 Ohio St.3d 1, 440 N.E.2d 801, 803 (1982).

<sup>112</sup> *Id.* at 802.

<sup>113</sup> *State ex rel. Donofrio v. Henderson*, 4 Ohio App.2d 183, 211 N.E.2d 854 (1965).

<sup>114</sup> *Miller*, 245 P.3d at 870 (quoting *Carr v. Thomas*, 586 P.2d 622, 625–26 (Alaska 1978)).

<sup>115</sup> *N. W. Cruiseship Ass'n of Alaska, Inc.*, 145 P.3d at 578.

initiative and the goal of ensuring that petition subscribers are well-informed upon signing."<sup>116</sup>

The Alaska Supreme Court long ago set forth the policy for interpreting laws relating to the initiative process:

In matters of initiative and referendum, we have previously recognized that the people are exercising a power reserved to them by the constitution and the laws of the state, and that the constitutional and statutory provisions under which they proceed should be liberally construed. To that end all doubts as to technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the accomplishment of that purpose.<sup>117</sup>

The right to vote by initiative is enshrined in the Alaska Constitution.<sup>118</sup> Why should the people's right to vote give way when a circulator is paid a dime more than \$1 per signature? Beyond "integrity of the process," Plaintiffs offer little justification to interpret AS 15.45.130 to disenfranchise Alaska voters over a technical defect, especially when the statute has prescribed criminal penalties for circulators who fail to follow the law.

For these reasons, this Court holds that "properly certified" in AS 15.45.130 means the petition is "complete" and contains the proper signatures of Alaskan voters. A circulator's affidavit under AS 15.45.130 can still be properly certified even if it contains an incorrect statement regarding the requirements for the affidavit, so long as it otherwise meets statutory requirements. This is because the integrity of the process is upheld by criminal penalty for any circulator who breaks the law.

#### **E. Alternatively, Does AS 15.45.130 Pose an Unconstitutional Restriction on Political Speech?**

Because the parties have clearly indicated an intention to seek immediate appellate review, this Court offers the following alternative holding on the

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<sup>116</sup> *Id.*

<sup>117</sup> *Municipality of Anchorage v Frohne*, 568 P.2d 3, 8 (Alaska 1977).

<sup>118</sup> See Alaska Const. art. XI, § 1.

certification statute, AS 15.45.130. Fair Share argues that Plaintiffs' interpretation of the statutory scheme "does not survive the constitutional requirement that restrictions to political speech be narrowly construed to avoid encroachment into the constitutional rights of citizens."<sup>119</sup> Even assuming Plaintiffs could achieve the remedy they seek in this case to prevent the Lieutenant Governor from counting the signatures in the petition booklets at issue, this Court has grave concern for the rights of the innocent voters who would be disenfranchised by the wholesale disregard of many thousands of petition signatures simply because of a technical defect, or even misdeed by the petition circulators.

As discussed above, petition circulation is core political speech because it involves interactive communication concerning political change.<sup>120</sup> Exacting scrutiny has been applied when the restrictions in question significantly inhibit communication with voters about proposed political change.<sup>121</sup> A law surpasses exacting scrutiny when it is narrowly tailored to fit a compelling state interest.<sup>122</sup>

AS 15.45.130 concerns petition circulation just like AS 15.45.110(c). But the statute includes a severe penalty. Section .130 provides that the "lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing." This means that AS 15.45.130 directly impacts the voters' right to engage in political speech since it requires the Lieutenant Governor to disqualify signatures when a petition is not "properly certified." Petitions must be certified by an affidavit containing at least eight different points.<sup>123</sup>

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<sup>119</sup> Fair Share's Mot. to Dismiss at 7 (May 18, 2020).

<sup>120</sup> *Nader*, 531 F.3d at 1035 (quotations omitted) (citing *Meyer*, 486 U.S. at 422, 425).

<sup>121</sup> *Buckley*, 525 U.S. at 193–94.

<sup>122</sup> *Nader*, 531 F.3d at 1037.

<sup>123</sup> The affidavit must state in substance (1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105; (2) that the person is the only circulator of that petition; (3) that the signatures were made in the circulator's actual presence; (4) that, to the best of the circulator's knowledge, the signatures are the signatures of the persons whose names they purport to be; (5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature; (6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c); (7) that the circulator has not violated AS 15.45.110(d) with respect to that petition; and (8) whether the circulator has received payment or agreed



The constitutional concern with AS 15.45.130 is the possibility that qualified voters will have their otherwise valid and proper political speech (their signatures) disregarded because of a knowing, or even unknowing, deficiency on an affidavit that is unrelated to the validity of the signatures. The voters who signed the petition booklets are innocent bystanders in this case, but they have constitutional rights as well. Their voices deserve to be heard, and should not be ignored simply because the circulator made a mistake. The circulator already faces the possibility of criminal action, but what redress for the innocent voter? Because Alaskan voters' right to bypass the legislature and enact laws directly is a right guaranteed by the state constitution,<sup>124</sup> and because it directly infringes on the First Amendment rights of the voters, the statutory remedy is subject to exacting scrutiny.

The high burden was succinctly stated in *North West Cruiseship*:

The voters who signed the . . . booklets have a right to participate in the initiative process and should not be disenfranchised because of the error of a circulator that had no impact upon them. This Court should construe the remedial portion of AS 15.45.130 only as broadly as is necessary to address the specific error. It should avoid an interpretation that requires a broader remedy that disenfranchises voters who did nothing wrong.<sup>125</sup>

While the Alaska Constitution permits the legislature to prescribe additional procedures for the initiative process,<sup>126</sup> those procedures must be narrowly tailored to avoid the wholesale disenfranchisement of qualified electors.<sup>127</sup> The Alaska Supreme Court has consistently stated the policy is to construe statutory initiative procedures liberally and in favor of upholding proposed initiatives.<sup>128</sup> The Court has

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to receive payment for the collection of signatures on the petition, and, if so, the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition. AS 15.45.130.

<sup>124</sup> See Alaska Const. art. XI, § 4.

<sup>125</sup> *N. W. Cruiseship*, 145 P.3d at 587.

<sup>126</sup> Alaska Const. art. XI, § 6; see also, *Buckley*, 525 U.S. at 187 (recognizing the States have an interest in petition drives in order to ensure fairness and integrity).

<sup>127</sup> *Fischer*, 741 P.2d at 225.

<sup>128</sup> See *Boucher*, 528 P.2d at 462, overruled on other grounds by *McAlpine*, 762 P.2d 81; see also *Thomas*, 595 P.2d at 3 ("The right of initiative and referendum, sometimes referred to as direct legislation, should be liberally construed to permit exercise of that right.").

steadfastly defended the right of Alaskans to enact law through the initiative process as “an act of direct democracy guaranteed by our constitution.”<sup>129</sup> The goal is for people to be permitted to vote and express their will on the proposed legislation.<sup>130</sup>

But the Court's inquiry is not directed at the wisdom of the petition, for that decision rests with the voters.<sup>131</sup> To pass constitutional muster, the statute is subject to exacting scrutiny, similar to AS 15.45.110(c). In this case, the remedial statute AS 15.45.130 impacts freedom of political speech by permitting otherwise valid signatures to be disregarded because of the certification requirement. Because the statute aims at political speech, Plaintiffs (or the State) must show the law is substantially related to a sufficiently important governmental interest.<sup>132</sup> Stated differently, in order to survive exacting scrutiny, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.”<sup>133</sup>

Voting is a fundamental right. In Alaska, the right to petition is a constitutionally protected right. The integrity of the initiative process must be balanced against those rights. Those who violate the initiative statutes are already subject to criminal penalties for any malfeasance. Why then is disregard of the voters' fundamental rights to engage in the initiative process a narrowly tailored remedy? Such a remedy disenfranchises the voters who did nothing wrong.

Further, disregarding the technical violation of the payment statute (which the court already determined was unconstitutional) by the circulators will act to promote the First Amendment rights of all parties to engage in core political speech. The voters will have the final say at the ballot box if the initiative is put to them for a vote. Plaintiffs have the right to comment on the merits of the petition, just as the backers

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<sup>129</sup> *Yute Air Alaska, Inc. v McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985) (holding that courts should be reluctant to invalidate initiatives.)

<sup>130</sup> *Thomas*, 595 P.2d at 3.

<sup>131</sup> *Boucher*, 528 P.2d at 463.

<sup>132</sup> *Nat'l Association for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1112 (9th Cir. 2019); see also *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010).

<sup>133</sup> *John Doe No. 1*, 561 U.S. at 196 (citations omitted).

of Fair Share may comment on their position. By contrast, disregard of thousands of otherwise valid signatures operates like a sledgehammer on a mosquito. It may do the job, but it wreaks havoc in the process. And there is no justification for such a remedy simply because a circulator failed to meet a technical requirement, something very likely outside the knowledge of the registered voters, limiting their rights, and unrelated to the substance of the petition.

The Court, with the record before it, has not been offered persuasive information about the state interest in the legislative action (disregard of voters' signatures) outside of the interests discussed above, and that generally speaking procedures are created for initiatives to create order and preserve the integrity of the process. But such a remedy is anything but narrowly tailored. Instead, the statute disregards the rights of voters with the justification of a technical error—something that cuts deeply into the constitutional rights of Alaskans when there are other ways to ensure the veracity and integrity of the process, including the criminal penalties, as discussed above. Why should voters be disenfranchised because a circulator fails to meet technical statutory requirements?

In the Court's view, the remedy of not counting signatures contained in AS 15.45.130 is not narrowly tailored to accomplish the goals of integrity and enforcing veracity because there are other, less restrictive ways to accomplish those goals without stripping away the voters' rights. As such, the stated remedy under AS 15.45.130 is an unconstitutional restriction on the free speech rights of the disenfranchised voters.

#### IV. CONCLUSION

For the reasons explained herein, this Court holds:

- 1) Plaintiffs have not asserted a cause of action for which relief may be granted, and so the State Defendants' April 30, 2020 *Cross-Motion to Dismiss Pursuant to Alaska Civil Rule 12(b)(6)* is GRANTED.

2) Because the payment restriction under AS 15.45.110(c) is unconstitutional, Defendant Fair Share's May 18, 2020, *Motion to Dismiss* is GRANTED.

3) Plaintiffs' June 2, 2020 *Cross Motion for Partial Summary Judgment* is hereby DENIED.

4) Because of the Court's rulings above, Plaintiffs' July 6, 2020 *Motion for Summary Judgment* is now Moot.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 16<sup>th</sup> day of July, 2020.



Thomas A. Matthews  
Superior Court Judge

I certify that on 7/16/20 a copy of this  
Order was emailed to:

M. Singer / L. Baxter / M. Paton-Walsh  
R. Brena / J. Wakeland

Judicial Assistant



IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL )  
FOR ALASKA, INC.; ALASKA TRUCKING )  
ASSOCIATION, INC.; ALASKA MINERS )  
ASSOCIATION, INC.; ASSOCIATED )  
GENERAL CONTRACTORS OF ALASKA; )  
ALASKA CHAMBER; and ALASKA )  
SUPPORT INDUSTRY ALLIANCE, )

Plaintiffs, )

v. )

KEVIN MEYER, in his official capacity )  
as Lt. Governor of the State of Alaska; )  
GAIL FENUMIAI, in her capacity as Director )  
of the Alaska Division of Elections; the )  
STATE OF ALASKA, DIVISION OF )  
ELECTIONS; and VOTE YES FOR )  
ALASKA'S FAIR SHARE, )

Defendants. )

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**APR 10 2020**

**Clerk of the Trial Courts**

Case No. 3AN-20- 5901 CI

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

**PARTIES**

1. Plaintiff Resource Development Council For Alaska, Inc. ("RDC") is an Alaska nonprofit corporation that is a statewide business association comprised of individuals and companies from Alaska's oil and gas, mining, forest products, tourism and fisheries industries. RDC's membership includes Alaska Native Corporations, local Alaska communities, organized labor, and industry support firms. RDC's purpose is to

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encourage a strong, diversified private sector in Alaska and expand the state's economic base through the responsible development of Alaska's natural resources.

2. Plaintiff Alaska Trucking Association, Inc. is an Alaska nonprofit corporation comprised of members of Alaska's trucking community, as well as companies that support, produce, manufacture or supply services to the trucking industry. The Alaska Trucking Association has advocated for the interests of active, for hire, private, and specialized trucking companies in the Alaska transportation industry, as well as companies that support the trucking industry for over 60 years.

3. Plaintiff Alaska Miners Association, Inc. is an Alaska nonprofit corporation comprised of entities and individuals involved in mineral production in the State of Alaska. Alaska Miners Association, Inc. encourages and supports responsible mineral production in Alaska through, among other things, monitoring and participating in the political process to ensure that lands remain available for responsible mineral exploration and development and that mineral production remains a viable industry in Alaska.

4. Plaintiff Associated General Contractors of Alaska is an Alaska nonprofit corporation comprised of members that are actively involved in residential, institutional and commercial building, industrial, infrastructure and heavy construction in Alaska, as well as those that support the Alaska construction industry. Among other things, Associated General Contractors of Alaska advocates on behalf of its members and the Alaska construction industry for responsible public policy that promotes construction in Alaska.

5. Plaintiff Alaska Chamber is an Alaskan member-based group that has been the voice of the Alaska business community since its founding in 1953. The Alaska Chamber's membership includes, among others, individual Alaskans, Alaska Native Corporations, oil and gas companies, trucking companies, banks, mining entities, and tourism companies.

6. Plaintiff Alaska Support Industry Alliance is an Alaska nonprofit corporation comprised of members of individuals and entities that support safe, environmentally responsible development of Alaska's oil, gas and mineral resources for the benefit of all Alaskans. Alaska Support Industry Alliance advocates on behalf of its members for public policy that supports the responsible development of Alaska's natural resources and the jobs that come with responsible development.

7. Defendant Kevin Meyer is the lieutenant governor of the State of Alaska and is sued solely in his official capacity with regard to the discharge of his duties under Article XI of the Alaska Constitution and Title 15, Chapter 45 of the Alaska Statutes.

8. Defendant Gail Fenumiai ("Director Fenumiai") is the Director of the Division of Elections and is sued solely in her official capacity with regard to the discharge of her duties under Article XI of the Alaska Constitution and Title 15, Chapter 45 of the Alaska Statutes.

9. Defendant State of Alaska, Division of Elections (the "Division") is the agency charged with, in conjunction with the Lieutenant Governor, administering Alaska ballot initiatives.

10. Defendant Vote Yes For Alaska's Fair Share is the official ballot group for the state-wide initiative entitled "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope." Hereinafter this initiative is referred to as "19OGTX."

### **FACTS**

11. Alaska law prohibits payment in excess of \$1 per signature gatherer. The same statute requires that signature gatherers must be Alaska citizens. These reasonable requirements were intended to protect Alaska's ballot initiative process from the corrupting influence of outside interests and to assure that ballot initiatives have the support of Alaskans.

12. On or about October 23, 2019, the Division of Elections issued printed petition booklets to the sponsors of the 19OGTX initiative.

13. On or before October 31, 2019, Vote Yes for Alaska's Fair Share hired Texas Petition Strategies of Buda, Texas, to collect the requisite number of signatures from Alaska voters to put 19OGTX on the state-wide ballot.

14. On or before January 16, 2020, Vote Yes for Alaska's Fair Share hired the Dallas, Texas office of a national professional signature gathering company based in Las Vegas, Nevada, Advanced Micro Targeting, Inc. ("Advanced Micro Targeting"), to collect the requisite number of signatures from Alaska voters to put 19OGTX on the state-wide ballot.

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15. The Division of Elections received in total 786 signed petition booklets for signatures gathered in support of putting 19OGTX on the ballot.

16. Of the total 786 petition booklets, zero (0) of them were submitted by individuals stating they were paid by Texas Petition Strategies to collect signatures.

17. Of the total 786 petition booklets, 544 of them were submitted by circulators stating they were paid by Advanced Micro Targeting to collect signatures.

18. As required by Alaska law, each of these circulators submitted a "Certification Affidavit" along with each petition booklet.

19. As required by Alaska law, each individual working for Advanced Micro Targeting swore that he or she had not "entered into an agreement with a person or organization in violation of AS 15.45.110(c)."

20. AS 15.45.110(c) provides in full: "A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition."

21. According to public filings, Vote Yes For Alaska's Fair Share paid \$130,000 to Texas Petition Strategies and \$72,500 to Advanced Micro Targeting.

22. Advanced Micro Targeting offered to pay an amount that is greater than \$1 per signature for the collection of signatures on a petition by advertising that it would pay signature gatherers \$3,500 - \$4,000 per month plus bonus, and that it expected 80-100 signatures per day, six days per week in return for such compensation.

23. On information and belief, Advanced Micro Targeting and/or Texas Petition Strategies paid to fly nonresident professional signature gatherers to Alaska, and also provided meals and lodging as additional compensation.

24. Upon information and belief, signature gatherers hired by Texas Petition Strategies to gather signatures on the 19OGTX petitions were subsequently hired and paid by Advanced Micro Targeting for the collection of signatures on the 19OGTX petitions. Upon information and belief, Texas Petition Strategies and/or Advanced Micro Targeting paid individuals in excess of \$1 a signature for the collection of signatures on the 19OGTX petitions.

25. Many of the circulators who stated they were paid by Advanced Micro Targeting who submitted the 19OGTX booklets falsely swore compliance with AS 15.45.110(c), as they were paid in excess of \$1 a signature for the collection of signatures on the 19OGTX petitions.

**COUNT I: DECLARATORY JUDGMENT**  
**(Violation of AS 15.45.110(c) and AS 15.45.130)**

26. Paragraphs 1-25 are herein incorporated.

27. AS 15.45.110(c) prohibits anyone from paying petition circulators in excess of \$1 a signature for the collection of signatures on petition booklets.

28. AS 15.45.130 requires each person who personally circulated a petition booklet to certify by affidavit swearing that the circulator, among other things, did not enter into an agreement that violated AS 15.45.110(c) or receive payment in excess of \$1 per signature.

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29. Pursuant to AS 15.45.130, each petition booklet must be certified by an affidavit of the circulator and “the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted.”

30. A petition booklet supported by a circulator’s false affidavit is not “properly certified” under AS 15.45.130.

31. Many of the circulator affidavits submitted with the 19OGTX petition booklets by the individuals who stated they were paid by Advanced Micro Targeting are false, and the petitions supported by those affidavits are not properly certified, because these individuals were paid in excess of \$1 per signature for the collection of signatures on the 19OGTX petitions.

32. Plaintiffs are entitled to a declaration that the 19OGTX petition booklets that are supported by false circulator affidavits have not been properly certified under AS 15.45.130 and that the signatures in those booklets may not be counted.

**COUNT II: INJUNCTIVE RELIEF**  
**(Invalidation of Offending Petition Booklets)**

33. Paragraphs 1-32 are herein incorporated.

34. AS 15.45.130 provides, in relevant part, that in “determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted.”

35. Many of the affidavits accompanying the 544 petition booklets by the individuals working for Advanced Micro Targeting to circulate petitions in support of

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19OGTX are false, and therefore not properly certified, because these individuals were paid in excess of \$1 per signature for the collection of signatures on the 19OGTX petitions.

36. The Court must enter an order that Lt. Governor Meyer must invalidate those petition booklets and all subscriptions contained within those booklets as not properly certified.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for relief as follows:

1. For a declaration from the Court that Alaska law requires the invalidation of all signatures contained in petition booklets submitted by the individuals paid in excess of \$1 per signature to collect signatures in support of 19OGTX because those petitions were submitted with false petition circulator affidavits.

2. For a declaration that the Lieutenant Governor and the Division of Elections may not count signatures contained in the petition booklets submitted by the individuals paid in excess of \$1 per signature to collect signatures in support of 19OGTX because those petitions were submitted with false petition circulator affidavits.

3. For a declaration that, in accordance with AS 15.45.130, the Lieutenant Governor may not count the signatures contained in the petition booklets that were falsely sworn to and not properly certified.

4. For a declaration that Vote Yes For Alaska's Fair Share violated AS 15.45.110(c) by effectively paying or agreeing to pay an amount that is greater than \$1

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per signature for the collection of signatures and that it otherwise failed to file a petition meeting the requirements of AS 15.45.140.

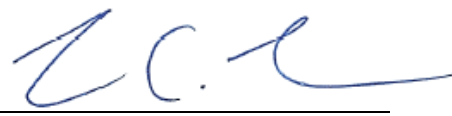
5. For entry of an injunction requiring the Lieutenant Governor and the Division of Elections to invalidate 19OGTX petition booklets not properly certified because they were submitted with false petition circulator affidavits and prohibiting the Lieutenant Governor and the Division of Elections from counting the signatures contained in those petition booklets.

6. For other and further relief as the court deems just and equitable.

DATED at Anchorage, Alaska this 10th day of April, 2020.

HOLLAND & KNIGHT LLP  
Attorneys for Plaintiffs

By:   
for Matthew Singer  
Alaska Bar No. 9911072

By:   
Lee C. Baxter  
Alaska Bar No. 1510085

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL	)	
FOR ALASKA, INC.; ALASKA TRUCKING	)	
ASSOCIATION, INC.; ALASKA MINERS	)	
ASSOCIATION, INC.; ASSOCIATED	)	
GENERAL CONTRACTORS OF ALASKA;	)	
ALASKA CHAMBER; ALASKA SUPPORT	)	
INDUSTRY ALLIANCE,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
KEVIN MEYER, in his official capacity,	)	
as Lt. Governor of the State of Alaska;	)	
GAIL FENUMIAI, in her capacity as Director	)	
of the Alaska Division of Elections; the	)	
STATE OF ALASKA, DIVISION OF	)	
ELECTIONS; and VOTE YES FOR	)	
ALASKA'S FAIR SHARE	)	
	)	
Defendants.	)	Case No. 3AN-20-05901CI
_____	)	

**MOTION TO CHARACTERIZE CASE AS NON-ROUTINE AND TO SET  
EXPEDITED DISCOVERY AND AUGUST 2020 TRIAL DATE**

**I. INTRODUCTION**

Plaintiffs Resource Development Council for Alaska, Inc.; Alaska Trucking Association Inc.; Alaska Miners Association, Inc.; Associated General Contractors of Alaska; Alaska Chamber; and Alaska Support Industry Alliance (collectively "Plaintiffs")

hereby move the Court, in accordance with the Third Judicial District's Uniform Pretrial Order,<sup>1</sup> to characterize this case as "non-routine," and to set an expedited timeline for discovery and an August 2020 trial date. Expedited discovery and an August 2020 trial date are necessary in this matter to ensure that Plaintiffs' challenges to the ballot initiative 19OGTX are decided before ballots are printed for statewide elections set for November 3, 2020.

Plaintiffs are mindful of the current public health crisis. This motion does not seek any immediate hearings or otherwise to interfere with current stay-at-home orders. However, some immediate action is required by this Court in order to be able to resolve this case by late-August, prior to printing of ballots that is likely to occur in September.

## **II. DISCUSSION**

This case is about whether many of the petition circulators who collected signatures in support of the 19OGTX initiative submitted false affidavits that they did not enter into agreements to receive more than \$1 per signature for the collection of signatures. The evidence will show that the majority of signature gatherers for the Fair Share effort were offered payment far in excess of the statutory limit on circulator payment in AS 15.45.110(c). Because signatures must be "properly certified," and a false certification is not a "proper" one, many of the signatures must be invalidated.

<sup>1</sup> Administrative Order 3A0-03-04 (Amended), *In re Uniform Pretrial Order* (Feb. 2003).

**A. Plaintiffs Have Filed this Motion Before Defendants Have Answered the Complaint because Waiting for Them to Answer the Complaint Will Leave the Court with Even Less Time to Consider the Merits of this Matter.**

Plaintiffs filed this case on April 10, 2020, and have served the Defendants by certified mail.<sup>2</sup> Under Civil Rule 12(a), the government defendants (Kevin Meyer, Gail Fenumiai, and State of Alaska Division of Elections) have 40 days from service to answer the complaint and the ballot group defendant (Vote Yes for Alaska's Fair Share) has 20 days to answer. While Plaintiffs would typically wait for these defendants to answer before filing this motion, there is simply not enough time to await those answers.

On March 17, 2020, Lieutenant Governor Kevin Meyer issued his determination that the petition was “properly filed” and met all requirements to be placed on the ballot.<sup>3</sup> Part of the lieutenant governor's determination was that the circulators who collected the signatures (subscriptions) to the petitions had submitted truthful affidavits required by Alaska statute. Under AS 15.45.130, “the lieutenant governor may not count subscriptions on petitions not properly certified at the time of the filing or corrected before the subscriptions are counted.” Certification requires each circulator to submit a truthful affidavit that states, among other things, that he or she had not received or agreed to receive “payment that is greater than \$1 a signature[.]”<sup>4</sup> Plaintiffs had 30 days from March 17 to

<sup>2</sup> See Rule 4(d)(7) and 4(h); Declaration of Counsel Matt Singer, ¶ 4 (April 17, 2020).

<sup>3</sup> See Letter from Lt. Governor Meyer to R. Brena (March 17, 2020), attached as **Exhibit A**.

<sup>4</sup> AS 15.45.110(c). AS 15.45.130(6) requires a circulator to swear under oath that he or she “has not entered into an agreement with a person or organization in violation of AS 15.45.110(c). AS 15.45.110(c), in turn, states “A circulator may not receive payment or agree to receive payment



file an action in superior court to challenge the lieutenant governor's determination that many of the circulator affidavits stating circulators had not received or agreed to receive payment greater than \$1 a signature to challenge in superior court.<sup>5</sup> Plaintiffs met this tight statute of limitations and filed this lawsuit on April 10, 2020.

Plaintiffs have only three and half months remaining to conduct discovery and to submit evidence to this Court that many of the circulator affidavits submitted in support of 19OGTX were false. The Court will then have to decide prior to the printing of ballots whether this intentional evasion of Alaska law requires invalidating signatures. Plaintiffs' counsel understands from extensive prior experience on ballot initiative work that the State of Alaska has historically printed statewide ballots in early September to ensure the ballots are completed and distributed by election day on the first Tuesday following the first Monday in November (this election year, November 3, 2020).<sup>6</sup> This three and a half month timeline necessitates that this Court treat this case as non-routine, to permit early discovery, and to set a trial in August 2020.

**B. A Circulator's Submission of a False Affidavit Renders the Signatures Contained in that Circulator's Petition Booklet Invalid. Over Two-Thirds of the Petition Booklets at Issue in this Lawsuit are Potentially Invalid because of False Circulator Affidavits.**

The allegations in Plaintiffs' complaint show why expedited proceedings in this

that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition."

<sup>5</sup> AS 15.45.240.

<sup>6</sup> See Singer Decl., ¶ 5.

matter are necessary. The Division of Elections received 786 signed petition booklets for signatures gathered in support of putting 19OGTX on the ballot.<sup>7</sup> Of those booklets, 69%, or 544 booklets, were submitted by circulators stating they were paid by Advanced Micro Targeting, Inc. (“Advanced Micro Targeting”), a professional signature gathering company based in Las Vegas Nevada.<sup>8</sup> There is strong evidence that those circulators were offered pay and indeed were paid in excess of \$1 per signature for the gathering of signatures for petition booklets.<sup>9</sup> These circulators submitted false affidavits swearing that they had not been paid in excess of \$1 per signature as prohibited by AS 15.45.110(c) and AS 15.45.130(6).

The legal remedy for a circulator’s submission of a false affidavit in support of the signatures he or she gathered is the invalidation of those collected signatures. While this is an issue of first impression in Alaska, other courts have held that petition circulators’ false affidavits invalidate all the signatures in that petition.<sup>10</sup> These cases emphasize that a circulator’s false affidavit undermines the integrity of the signatures that circulator has

<sup>7</sup> Plaintiffs Complaint, ¶ 15 (Apr. 10, 2020).

<sup>8</sup> *Id.*, ¶¶ 14, 17.

<sup>9</sup> *Id.*, ¶ 22.

<sup>10</sup> See e.g. *Zaiser v. Jaeger*, 822 N.W.2d 472, 480 (N.D. 2012); *Brousseau v. Fitzgerald*, 675 P.2d 713, 715–16 (Ariz. 1984); *Sturdy v. Hall*, 143 S.W.2d 547, 550–52 (Ark. 1940); *Citizens Comm. v. District of Columbia Bd. of Elections and Ethics*, 860 A.2d 813, 816–17 (D.C. 2004); *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 777 (Mont. 2006); *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 82 (Maine 2002); *McCaskey v. Kirchoff*, 152 A.2d 140, 142–43 (N.J. Super. Ct. App. Div. 1959); *In re Glazier*, 378 A.2d 314, 315–16 (Pa. 1977); *State ex rel. Gongwer v. Graves*, 107 N.E. 1018, 1022 (Ohio 1913).

gathered, and that invalidation of all signatures is the appropriate remedy to ensure compliance in the future and the legality of the petition at issue. As the Arizona Supreme Court explained:

Defects either in circulation or signatures deal with matters of form and procedure, but the filing of a false affidavit by a circulator is a much more serious matter involving more than a technicality. The legislature has sought to protect the process by providing for some safeguards in the way nomination signatures are obtained and verified. Fraud in the certification destroys the safeguards unless there are strong sanctions for such conduct such as voiding of petitions with false certifications.<sup>11</sup>

That is the precise issue in this lawsuit: whether the circulators who stated they were paid by Advanced Micro Targeting falsely swore that they had not agreed to receive or actually received payment in excess of the statutory limit.<sup>12</sup>

If Plaintiffs show that 69% percent of petition booklets (544 booklets) were supported by false circulator affidavits, all of the signatures in those booklets are invalid and 19OGTX will lack the requisite number of signatures under AS 15.45.140 to be on the

<sup>11</sup> *Brousseau*, 675 P.2d at 715.

<sup>12</sup> As noted above, the proper remedy for a false circulator affidavit is an issue of first impression in Alaska. The closest the Alaska Supreme Court has come to analyzing the proper remedy for false circulator affidavits is its decision in *North West Cruiseship Association of Alaska, Inc. v. State of Alaska et al.*, 145 P.3d 573 (Alaska 2006). But, that case **did not** involve false circulator affidavits. Rather, that case involved whether individual signatures within a petition booklet should be invalidated because they did not include all of the necessary information (such as the date the person was signing the petition and subscriber addresses) and whether the circulator's failure to provide information in the petition booklets for subscribers to review (such as who was paying the circulator listed **on each page of the petition booklet**) should invalidate the specific signatures that did not include the necessary information or were on pages without the proper circulator information. *North West Cruiseship Assn*, 145 P.3d at 582-589. This case, on the other hand, involves what is the appropriate remedy when a circulator submits a false affidavit in support of a petition booklet.

November 3, 2020 statewide ballot. An expedited discovery process and an August 2020 trial is necessary to ensure that this dispute is resolved on the merits and an invalid initiative supported by false circulator affidavits is not on this fall's statewide ballot.

**C. To Facilitate Resolution of Plaintiffs' Claims on the Merits, this Court Should Characterize this Case as "Non-Routine" and Set Early Discovery and Trial for August 2020.**

The Third Judicial District's Uniform Pretrial Order requires that this Court characterize this civil case as either "Routine" or "Non-Routine."<sup>13</sup> If this matter is designated as "routine," then standard pretrial deadlines are set for motions practice and discovery to bring the case to trial approximately 12-14 months from when the case was filed. For instance, if the case is designated routine, "[e]ach party must file and serve a preliminary witness list **22 weeks** prior to trial."<sup>14</sup> Given there is only three and a half months until the State prints ballots for the general election, this case should be designated "Non-Routine" so that truncated pretrial deadlines and an August 2020 trial can be set.

Paragraph E. of the Third Judicial District Uniform Pretrial Order states:

The requirements and deadlines for Non-Routine cases may vary from the Routine Pretrial Order as the needs of the case may require in the discretion of the court. A Non-Routine Pretrial Order shall be issued and state, with specificity, the particular variations from the Routine Pretrial Order authorized. Except as specified in the Non-Routine Pretrial Order, the requirements and deadlines for Routine cases, as set out in the original Routine Pretrial Order, shall apply.

<sup>13</sup> Paragraph B of the Uniform Pretrial Order (Feb. 2003).

<sup>14</sup> Paragraph D.3. of the Uniform Pretrial Order.

Plaintiffs ask the Court to characterize this case as Non-Routine and set the following pretrial deadlines:

<b>Pretrial Task</b>	<b>Deadline</b>
Amendment of Pleadings and Addition of Parties	15 days from distribution of Court's Non-Routine Pretrial Order
Preliminary Witness List	30 days from distribution of Court's Non-Routine Pretrial Order
Final Witness List	14 days before start of trial
Expert Witnesses	<ul style="list-style-type: none"> <li>• Retained Expert Identification – 10 weeks prior to trial</li> <li>• Retained Expert Witness Reports – 5 weeks prior to trial</li> <li>• Other Expert Opinion Testimony Summary – 6 weeks prior to trial</li> </ul>
Discovery	<ul style="list-style-type: none"> <li>• Written Discovery and Depositions — may immediately begin but depositions and propounding of written discovery may not occur after 60 days prior to trial</li> <li>• Expert Witness Depositions – must be completed 2 weeks prior to trial</li> </ul>
Dispositive Motions	Summary judgment motions, motions to dismiss, and motions for rulings of law must be filed and served no later than 1 week prior to trial
Expert Testimony Motions	4 weeks prior to trial
Discovery Motions	4 weeks prior to trial
Jury Instructions	Exchanged 1 week prior to trial
Exhibits	Exchanged 4 days prior to trial
Trial Briefs	1 week prior to trial
Pretrial Conference	1 week prior to trial

These truncated deadlines are necessary for this matter to be resolved on the merits with fairness to all parties.

### III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court, in accordance with the Third Judicial District's Uniform Pretrial Order, characterize this lawsuit as "non-routine," to set the above-listed pretrial deadlines and trial for August 2020.

DATED at Anchorage, Alaska this 17th day of April, 2020.

HOLLAND & KNIGHT LLP  
Attorneys for Plaintiffs

By: /s/Matthew Singer  
Matthew Singer  
Alaska Bar No. 9911072

By: /s/Lee C. Baxter  
Lee C. Baxter  
Alaska Bar No. 1510085



Lieutenant Governor Kevin Meyer  
STATE OF ALASKA

March 17, 2020

Robin O. Brena  
810 N Street, Suite 100  
Anchorage, AK 99501

Re: 19OGTX – Fair Share Initiative

Mr. Brena:

I have reviewed your petition for the initiative entitled "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope" and have determined that the petition was properly filed. My notice of proper filing is enclosed. Specifically, the petition was signed by qualified voters from all 40 house districts equal in number to at least 10 percent of those who voted in the preceding general election; with signatures from at least 30 house districts matching or exceeding seven percent of those who voted in the preceding general election in the house district. The Division of Elections verified 39,174 voter signatures, which exceeds the 28,501 signature requirement based on the 2018 general election. A copy of the Petition Statistics Report prepared by the Division of Elections is enclosed.

With the assistance of the attorney general, I have prepared the following ballot title and proposition that meets the requirements of AS 15.45.180:

***An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope***

This act would change the oil and gas production tax for areas of the North Slope where a company produced more than 40,000 barrels of oil per day in the prior year and more than 400 million barrels total. The new areas would be divided up based on "fields, units, and nonunitized reservoirs" that meet the production threshold. The act does not define these terms. For any areas that meet the production threshold, the tax would be the greater of one of two new taxes.

(1) One tax would be a tax on the gross value at the point of production of the oil at a rate of 10% when oil is less than \$50 per-barrel. This tax would increase to a maximum of 15% when oil is \$70 per-barrel or higher. No deductions could take the tax below the 10% to 15% floor.

(2) The other tax, termed an "additional tax," would be based on a calculation of a production tax value for the oil that would allow lease expenditure and transportation cost deductions. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and \$50. The difference between the two would be multiplied by the volume of oil, and then that amount would be multiplied by 15%. The existing per-taxable-barrel credit would not apply. The act uses the term "additional tax" but it does not specify what the new tax is in addition to.

The tax would be calculated for each field, unit, or nonunitized reservoir on a monthly basis. Taxes are currently calculated on an annual basis, with monthly estimated payments. Since these new taxes would only apply to certain areas, a taxpayer would still have to submit annual taxes for the areas where the new taxes do not apply.

The act would also make all filings and supporting information relating to the calculation and payment of the new taxes "a matter of public record." This would mean the normal Public Records Act process would apply.

Should this initiative become law?

This ballot proposition will appear on the election ballot of the first statewide general, special, or primary election that is held after (1) the petition has been filed; (2) a legislative session has convened and adjourned; and (3) a period of 120 days has expired since the adjournment of the legislative session. Barring an unforeseen special election or adjournment of the current legislative session occurring on or before April 19, 2020, this proposition will be scheduled to appear on the general election ballot on the November 3, 2020 general election. If a majority of the votes cast on the initiative proposition favor its adoption, I shall so certify and the proposed law will be enacted. The act becomes effective 90 days after certification.

Please be advised that under AS 15.45.210, this petition will be void if I, with the formal concurrence of the attorney general, determine that an act of the legislature that is substantially the same as the proposed law was enacted after the petition has been filed and before the date of the election. I will advise you in writing of my determination in this matter.

Please be advised that under AS 15.45.240, any person aggrieved by my determination set out in this letter may bring an action in the superior court to have the determination reversed within 30 days of the date on which notice of the determination was given.

If you have questions or comments about the ongoing initiative process, please contact my staff, April Simpson, at (907) 465-4081.

Sincerely,



Kevin Meyer  
Lieutenant Governor

Enclosures

cc: Kevin G. Clarkson, Attorney General  
Gail Fenumiai, Director of Elections





Lieutenant Governor Kevin Meyer  
STATE OF ALASKA

## NOTICE OF PROPER FILING

I, KEVIN MEYER, LIEUTENANT GOVERNOR FOR THE STATE OF ALASKA, under the provisions of Article XI of the Constitution of the State of Alaska and under the provisions of AS 15.45, hereby provide notice that the initiative petition for "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope" which was received on August 16, 2019, and known as 19OGTX, was properly filed.

I have determined that the initiative sponsors have timely filed the petition and that the petition is signed by qualified voters (1) equal in number to 10 percent of those who voted in the preceding general election; (2) resident in at least three-fourths of the house districts in the state; and (3) who, in each of the house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district.

In accordance with AS 15.45.190, the Director of the Division of Elections shall place the ballot title and proposition on the election ballot of the first statewide general, special, or primary election that is held after a period of 120 days has expired since the adjournment of the legislative session. Barring any unforeseen special election or adjournment of the current legislative session on or before April 19, 2020, this proposition is scheduled to appear on the general election ballot on the November 3, 2020 general election.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed hereto the Seal of the State of Alaska, at Juneau, Alaska,

This 17th day of March, 2020.

  
.....  
KEVIN MEYER, LIEUTENANT GOVERNOR

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL	)	
FOR ALASKA, INC.; ALASKA TRUCKING	)	
ASSOCIATION, INC.; ALASKA MINERS	)	
ASSOCIATION, INC.; ASSOCIATED	)	
GENERAL CONTRACTORS OF ALASKA;	)	
ALASKA CHAMBER; ALASKA SUPPORT	)	
INDUSTRY ALLIANCE,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
KEVIN MEYER, in his official capacity,	)	
as Lt. Governor of the State of Alaska;	)	
GAIL FENUMIAI, in her capacity as Director	)	
of the Alaska Division of Elections; the	)	
STATE OF ALASKA, DIVISION OF	)	
ELECTIONS; and VOTE YES FOR	)	
ALASKA'S FAIR SHARE	)	
	)	
Defendants.	)	Case No. 3AN-20-05901CI
	)	

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**DECLARATION OF COUNSEL MATT SINGER**

I, Matt Singer, declare as follows:

1. My name is Matt Singer. All statements in this declaration are based on my own personal knowledge.
2. I am a Partner at Holland & Knight LLP. I have been retained by the Plaintiffs in the above-captioned matter.
3. I caused the Complaint in this lawsuit to be filed on April 10, 2020.

4. I caused service of the Complaint in this lawsuit to be served via certified mail through the United States Postal Service on Defendants. The Complaint was mailed to each defendant on April 10, 2020.

5. I have received from the postal service the certified return receipts showing service of the Complaint on the Defendants Vote Yes for Alaska's Fair Share, Lt. Governor Kevin Meyer, Gail Fenumiai, Director of Division of Elections, Attorney General Kevin Clarkson and the Chief of Staff of the Attorney General's office in Anchorage as of April 13, 2020.

6. I have been an Alaska-barred attorney since 1999. I have worked on many cases involving ballot initiatives during my legal career. From my experience on these prior matters, I know that the State of Alaska, Division of Elections typically sends ballots to the printers in early September of an election year so that the ballots are ready and distributed by election day in early November.

7. In order to litigate this case on the merits, the Court will need to deviate from the typical pretrial deadlines contained in the Third Judicial District's Uniform Pretrial Order. There is not enough time between the lieutenant governor's determination on March 17, 2020 that 19OGTX could appear on the state-wide ballot and early September when the State has the state-wide ballots printed. An August 2020 trial date will provide the parties with the most time to complete discovery and other pretrial tasks and still be able to obtain a ruling and stop the inclusion of 19OGTX on the ballot.

I declare that the above statements are true to the best of my knowledge and belief, and that I understand that they are made for use as evidence in court and are subject to the penalty of perjury.

Respectfully submitted this 17th day of April, 2020.

By: /s/ Matthew Singer  
Matthew Singer  
Alaska Bar No. 9911072



IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT )  
COUNCIL FOR ALASKA, INC.; )  
ALASKA TRUCKING ASSOCIATION, )  
INC.; ALASKA MINERS ASSOCIATION )  
INC.; ASSOCIATED GENERAL )  
CONTRACTORS OF ALASKA; )  
ALASKA CHAMBER; ALASKA )  
SUPPORT INDUSTRY ALLIANCE, )

Plaintiffs, )

v. )

KEVIN MEYER, in his official capacity )  
as Lt. Governor of the State of Alaska; )  
GAIL FENUMIAI, in her capacity as )  
Director of the Alaska Division of )  
Elections; the STATE OF ALASKA, )  
DIVISION OF ELECTIONS; and VOTE )  
YES FOR ALASKA'S FAIR SHARE, )

Defendants. )

Case No. 3AN-20-05901CI

**ORDER RE DISCOVERY PLAN**

**I. INTRODUCTION**

Plaintiffs in this case seek injunctive and declaratory relief in relation to a state-wide ballot initiative entitled "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope" (referred to by the parties and herein as "190GTX"). Plaintiffs complain the initiative circulators were paid more than \$1 per signature in violation of AS 15.45.110(c), and as a result the circulator affidavits submitted to the Division of Elections were false.<sup>1</sup> As a result of these alleged irregularities, Plaintiffs seek a declaration that certain petition booklets were improperly "certified under AS 15.45.130 and that the signatures in those booklets may not be

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<sup>1</sup> Plaintiffs' Complaint at paragraphs 24-25.



counted.”<sup>2</sup> In addition, Plaintiffs seek an injunction ordering “that Lt. Governor Meyer must invalidate those petition booklets and all subscriptions contained within those booklets as not properly certified.”<sup>3</sup>

## **II. PLAINTIFFS’ REQUEST FOR EXPEDITED DISCOVERY**

Within days of filing their complaint in this case, Plaintiffs sought an order characterizing the case as non-routine, and setting an expedited discovery schedule and trial date. After all parties appeared in the case, the Court held an expedited hearing to address Plaintiff’s request. All parties agree there is at least one novel legal issue to be addressed in this case – whether signatures which are gathered in violation of the \$1/signature statute should be disregarded and not counted. Defendants claim that such a remedy would disenfranchise 39,149 Alaskan voters and block the Fair Share Act from the ballot. The parties expect the Alaska Supreme Court will ultimately have to decide the case.

Because of the timing of the election, and the State’s need to print ballot books by September, 2020, there is a clear need for an accelerated schedule in this case. As a result, the Court ordered Plaintiffs to submit a proposed discovery plan to the Court which would be specific and focused: “Outline for me exactly what it is you’re going to be looking for and how that relates to the issues that need to be briefed.”<sup>4</sup> As requested, Plaintiffs submitted a proposed discovery plan, to which Defendants object. Not surprisingly, the parties disagree as to whether the proposed plan meets the Court’s request for a narrowly tailored discovery plan.<sup>5</sup>

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<sup>2</sup> Plaintiffs’ Complaint, Count I paragraph 32.

<sup>3</sup> Plaintiffs’ Complaint, Count II paragraph 36.

<sup>4</sup> Defendant Fair Share’s Objection to Discovery Plan, Exhibit 1, Transcript of May 13, 2020 Status hearing at 36:19-37:9.

<sup>5</sup> Defendants’ further argue the Court should not allow any discovery at this stage, and should instead address the pending motions.



### III. APPLICABLE LAW

The Alaska civil rules are committed to a system of liberal pretrial discovery.<sup>6</sup> Discovery rules are to be broadly construed, and relevance for purposes of discovery is broader than for purposes of trial.<sup>7</sup> The purpose of discovery is “to narrow the issues, obtain evidence for use at trial, and secure information about where and how such evidence can be obtained”.<sup>8</sup>

Rule 26(b) allows parties to “obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action.”<sup>9</sup> “The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>10</sup>

The superior court has broad discretion in determining the extent of discovery.<sup>11</sup> The Court may limit the frequency or extent of the discovery if it determines that: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.<sup>12</sup>

### IV. DISCUSSION

This is not a case where wide-open discovery is either necessary or desirable. The parties dispute centers around a core legal issue: What remedy is available if a petition circulator violates AS 15.45.110(c) and 15.45.130? As the court indicated at the

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<sup>6</sup> *Jones v. Jennings*, 788 P.2d 732, 735 (Alaska 1990).

<sup>7</sup> *Lee v. State*, 141 P.3d 342 (Alaska 2006).

<sup>8</sup> *McKibben v. Mokawk Oil Co., Ltd.*, 667 P.2d 1223, 1231 (Alaska 1983).

<sup>9</sup> AK R. Civ. Pro. 26(b).

<sup>10</sup> *Id.*

<sup>11</sup> *Jones* at 735.

<sup>12</sup> AK R. Civ. Pro. 26(b)(2) (Discovery limitations).



status hearing, this issue could be decided expeditiously if the parties simply agree to motion practice where the factual allegations in the Complaint are taken as true. Summary judgment motions or trial are also alternatives, but both will require considerably more time and expense. Defendants have already initiated motion practice, but it is not yet ripe for the Court's review.<sup>13</sup>

As indicated above, the Court has broad discretion in determining the extent of discovery which may be permitted. The Court may limit discovery where the burden or expense of the proposed discovery outweighs its likely benefit.<sup>14</sup> Turning to the proposed discovery in this case, the Court will allow certain limited discovery, but not to the extent requested by Plaintiffs.

One of the central objections interposed by Fair Share is that Plaintiffs are seeking discovery which reaches beyond the scope of the Complaint. In particular, Fair Share objects to Plaintiffs' discovery related to payments or arrangements with petition circulators directly, because there are no allegations in the Complaint relating to such independent circulators. The Court agrees.

## **V. DISCOVERY TO VOTE YES**

The Following Discovery Requests to Fair Share appear sufficiently related to the issues in the Complaint and the likely motion practice that discovery is appropriate: RFP # 1, #2. In addition, #4 and #5 will be permitted, provided they are revised to reflect communications or work by Advanced Micro Targeting, Inc. and Texas Petition Strategies, LLC.<sup>15</sup>

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<sup>13</sup> The State Defendants' Motion to Dismiss is now ripe, but the Court intends to consider it together with Fair Share's Motion because of the overlay in issues.

<sup>14</sup> AK R. Civ. Pro. 26(b)(2).

<sup>15</sup> The remaining requests are considered overly broad.



**VI. DISCOVERY TO ADVANCED MICRO TARGETING, INC.**

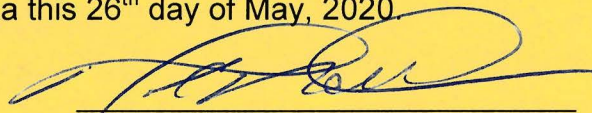
The Following Discovery Requests to Advanced Micro Targeting, Inc. appear sufficiently related to the issues in the Complaint and the likely motion practice that discovery is appropriate: #1, #2, #5, #6, #8.<sup>16</sup>

**VII. CONCLUSION**

As specifically limited by this Order, discovery may proceed. The Court may consider additional discovery if the needs of the case warrant it.<sup>17</sup>

**IT IS SO ORDERED.**

DATED at Anchorage, Alaska this 26<sup>th</sup> day of May, 2020.



Thomas A. Matthews  
Superior Court Judge

I certify that on 5/26/20 a copy of this  
Order was emailed to:

M. Singer / L. Baxter / M. Paton-Walsh  
R. Brena / J. Wakeland

Judicial Assistant

<sup>16</sup> The remaining requests are considered overly broad.

<sup>17</sup> For example, the State indicated at the Status hearing that it might need or want testimony from the circulators themselves. Since the State Defendants have not specifically weighed in on Plaintiffs' proposed discovery plan at this stage, the Court need not decide at this point whether such additional discovery is necessary. All parties should be mindful that any proposed discovery should be narrowly tailored to meet the specific needs of any planned or anticipated motion practice, and the exceptional time constraints of the case.